Supreme Court, U.S.
FILED

03 258 AUG 15 2003

No.___

IN THE SUPREME COURT OF THE UNITED STATES

In re ROY S. MOORE, in his official capacity as Chief Justice of the State of Alabama,
Petitioner.

ON PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, AND THE HONORABLE MYRON H. THOMPSON.

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Amendment to the United States Constitution prohibits a federal court from directing an injunction against a state, in addition to a state official who is the only party defendant, when the injunction requires the exercise of discretionary government power by officials other than the party defendant, and when the injunction contains a forecast of significant civil penalties payable by the state in case of noncompliance with the injunction.

2. Whether the constitutional supremacy and oath provisions of Article VI of the United States preclude a federal court in this case from issuing an injunction requiring a popularly elected state chief justice to exercise his discretionary authority over the administration of justice in the state contrary to the chief justice's oath to support the Constitution of the United States and the constitution of the state.

LIST OF PARTIES

1. Glassroth, Stephen R. (plaintiff)
2. Howard, Beverly (plaintiff)
3. Maddox, Melinda (plaintiff)
4. Moore, Roy S. (defendant)

LIST OF PERSONS PERSONALLY SERVED WITH FINAL JUDGMENT AND INJUNCTION

1. Brown, Jean, Associate Justice of the Alabama Supreme Court
2. Childree, Robert, Comptroller of the State of Alabama
3. Esdale, Robert, Clerk of the Alabama Supreme Court
4. Harwood, Bernard, Associate Justice of the Alabama Supreme Court
5. Hobson, Rich, Alabama Administrative Director of Courts
6. Houston, Gorman, Associate Justice of the Alabama Supreme Court
7. Ivey, Kay, Treasurer of the State of Alabama
8. Johnstone, Douglas, Associate Justice of the Alabama Supreme Court
9. Lyons, Champ, Associate Justice of the Alabama Supreme Court

10. Moore, Roy, Chief Justice of the Alabama Supreme Court
11. Pryor, Bill, Attorney General of the State of Alabama
12. Riley, Bob, Governor of the State of Alabama
13. See, Harold, Associate Justice of the Alabama Supreme Court
14. Stuart, Lyn, Associate Justice of the Alabama Supreme Court
15. Woodall, Thomas, Associate Justice of the Alabama Supreme Court

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PETITION FOR A WRIT OF MANDAMUS AND/OR A WRIT OF PROHIBITION

Petitioner, Alabama Chief Justice Roy S. Moore, respectfully petitions for a writ of mandamus, or in the alternative a petition for a writ of prohibition, relieving petitioner from a final judgment and injunction entered on August 5 and 6, 2003 by United States District Judge, the Honorable Myron Thompson for the Middle District of Alabama in the consolidated cases of *Glassroth v. Moore* (Civil Action No. 01-T-1268-N) and *Melinda Maddox, et al. v. Moore* (Civil Action No. 01-T-1269-N). (App. 1a, 8a).

THE PETITION IS FILED IN AID OF THIS COURT'S APPELLATE JURISDICTION

No later than September 29, 2003, Petitioner Chief Justice Roy S. Moore will file a petition for a writ of certiorari to review the July 1, 2003 judgment of the United States Court of Appeals for the Eleventh Circuit (*Glassroth v. Moore,* 335 F.3d 1282 (11th Cir. 2003), App. 89a) , which affirmed the decision of the United States District Court for the Middle District (*Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), App. 17a) which led directly to the entry of said final judgment and injunction entered on August 5 and 6, 2003. (App. 1a, 8a). Relieving the Petitioner Chief Justice of the obligation, under the threat of contempt, to obey said final judgment and injunction will aid this Court to conduct an orderly and timely review of Petitioner Chief Justice's petition for a writ of certiorari by foreclosing a real threat of his removal from office for noncompliance with the injunction.

THE RELIEF SOUGHT IS NOT AVAILABLE IN ANY OTHER COURT

Petitioner seeks relief from the District Court's enforcement of an injunction directed against him and the State of Alabama in violation of the Eleventh Amendment to the Constitution, and in violation of his oath of office under the United States and Alabama Constitutions in derogation of the sovereignty of the State of Alabama guaranteed by the Tenth Amendment. Relief from this threat is not available in any other court by means of a motion for stay, or by defense in a contempt proceeding, or in any other proceeding but by writ of prohibition and/or mandamus issued from this Court which alone has the power to review the constitutionality of the final judgment and injunction under the Tenth and Eleventh Amendments to and Article VI of the United States Constitution in a manner that would protect Petitioner Chief Justice from removal from office and the exercise of his right to file a timely petition for certiorari to this Court.

OPINIONS BELOW

The final judgment and injunction in *Glassroth v. Moore, et al* was entered on August 5 and 6, 2003 (App. 1a, 8a), and is unreported. Entry of said final judgment and injunction was based upon an order previously entered on December 23, 2002 (App. 10a), and reported at 242 F. Supp. 2d 1068 (M.D. Ala. 2002), and upon an opinion and judgment entered on November 18, 2002 (App. 17a), and reported at 229 F. Supp. 1290 (M.D.

Ala. 2002). On July 1, 2003, the November 18, 2002 opinion and judgment was affirmed by the U. S. Court of Appeals for the Eleventh Circuit (App. 86a) and is reported at 335 F.3d 1282, 2003 WL 21499258 (11th Cir. 2003). On July 30, 2003, the opinion of the Court of Appeals was issued as a mandate to the U. S. District Court (App. 136a) and is unreported.

JURISDICTION

This Court has jurisdiction of this writ of prohibition and/or mandamus under 28 U.S.C. § 1651(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the constitutional supremacy and oath provisions of Article VI of the U.S. Constitution, and the Establishment and Free Exercise Clauses of the First Amendment, the Tenth and Eleventh Amendments, and the Due Process Clause of the Fourteenth Amendment, to the U.S. Constitution. (App. 139a-40a). This case also concerns the Preamble and the oath provision of Article XVI, § 279 of the Alabama Constitution of 1901, and Amendments 328 (§§ 6.10 and 6.19) and 581 (§§ 6.17 and 6.18) to the Alabama Constitution of 1901. (App. 141a-43a).

STATUTES AND RULES INVOLVED

This case involves Rule 41(a) of the Federal Rules of Appellate Procedure and Rule 65(d) of the Federal Rules of

Civil Procedure. (App. 147a). This case also involves §§ 12-2-6, 12-2-30(a) and (b) (7), and 12-5-20 of the Code of Alabama. (App. 148a-49a).

STATEMENT OF THE CASE

On July 31 and August 1, 2001, Petitioner, Alabama Chief Justice Roy S. Moore, exercising his statutory and constitutional authority as administrative head of the state judicial system and as lessee of the State Judicial Building, placed in the rotunda area of the State Judicial Building in Montgomery, Alabama, a monument engraved with excerpts of the Ten Commandments and of several official government and historical sources (hereafter, "monument"). 229 F. Supp. 2d at 1290, 1294-95, 1320-21 (App. 17a, 20a-23a, 77a-80a). In his unveiling speech, the Chief Justice stated that the monument "depict[s] the moral foundation of our law" and "remind[s] the ... judges ... of this state, the members of the bar..., as well as the people who visit the Alabama Judicial Building, of the truth stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke 'the favor and guidance of Almighty God.'"[1] *Id.* at 1322 (App. 81a-82a).

On October 30, 2001, Plaintiffs Stephen R. Glassroth and Melinda Maddox *et al.* filed two separate lawsuits against the Chief Justice in his official capacity in the U. S. District Court

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[1] The monument is "an acknowledgment of the sovereignty of that God and those absolute standards upon which our laws are based." 229 F. Supp. 2d at 1324 (App. 87a).

for the Middle District of Alabama, praying for an injunction to remove the monument. *Id.* at 1293, 1319 (App. 19a, 75a). The cases were consolidated. On November 18, 2002, following a bench trial, U. S. District Judge Myron Thompson issued an opinion and an order declaring that the monument violated the Establishment Clause "as incorporated into the Fourteenth Amendment and enforced by 42 U.S.C.A. § 1983," giving Chief Justice Moore 30 days to voluntarily remove the monument; "[t]he court retain[ing] jurisdiction to impose and enforce an injunction." *Id.* at 1319 (App. 76a).

Having found that the Chief Justice had failed to remove the monument within the 30-day period, and having rejected the Chief Justice's claim that it had no authority or jurisdiction to grant injunctive relief, the District Court, on December 19, 2002, issued a permanent injunction requiring the Chief Justice "his officers, agents, servants, and employees, and those persons in active concert or participation with him who receive actual notice of this injunction" to remove the monument. *Glassroth v. Moore*, 242 F. Supp. 2d 1067 (M.D. Ala. 2003) (App. 16a). On the same date, Chief Justice Moore noticed his appeal to the U. S. Court of Appeals for the Eleventh Circuit and moved to stay the injunction. On December 23, 2001, the District Court granted the motion to stay. (App. 14a).

On July 1, 2003, the U. S. Court of Appeals for the Eleventh Circuit affirmed the trial court's ruling that the monument "violates the Establishment Clause." 2003 WL 21499258, *16 (App. 122a). In doing so, it noted that "Establishment Clause challenges are not decided by bright-line rules, but on a case-

by-case basis with the result turning on the specific facts." *Id.* at *6 (App. 102a). Deferring to the findings of fact of the District Court, including the finding of "religious purpose," the Court of Appeals concluded that the District Court's findings were not "clearly erroneous." *Id.* at *15 (App. 121a). At the same time, the Court of Appeals rejected the Chief Justice's claim that no injunctive relief could be granted in the case because such relief would require the Chief Justice to violate his oath of office to support the constitutions of the United States and the State of Alabama. *Id.* at *20-21 (App. 131a-35a). This claim, if sustained, the court asserted, would undermine "a core principle of the rule of law in this country," which requires "every person to obey judicial orders when all available means of appealing them have been exhausted":

> We do expect that if he is unable to have the district court's order overturned through the usual appellate processes, when the time comes Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail.

Id. at *20-21 (App. 131a, 135a).

On July 30, 2003, the Court of Appeals issued its opinion as its mandate. (App. 136a). Thereafter, on August 5, 2003, notwithstanding the Chief Justice's opposition that it had neither the authority nor the jurisdiction (App. 4a), the District Court lifted its stay, and entered its final judgment and injunction ordering "Roy S. Moore, his officers, agents, servants, and employees, and those persons in active concert or

participation with him who receive actual notice of this injunction, be and they are each ENJOINED and RESTRAINED from failing to remove, by no later than August 20, 2003, the Ten Commandments monument." (App. 5a).

Additionally, "in view of the Chief Justice's recent reassertion that this court does not have the authority or jurisdiction to enter an injunction in this case," the District Court included in its final judgment and order "some preliminary idea of the court's thinking as to how the court will proceed if later there is an allegation that today's injunction has not been complied with within the time allowed"[2]:

> If the plaintiffs file a motion for civil contempt, the court will immediately issue a show-cause order. If, based upon the show-cause-order response and the evidence presented at a hearing, there is a finding of civil contempt, the court could levy substantial fines against Chief Justice Moore in his official capacity and, thus, against the State of Alabama itself, until the monument is removed.... For example, the court could levy a fine of $5,000 a day for the first

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[2] The District Court asserted in a footnote that "[t]hese preliminary thoughts are just that: preliminary and only thoughts. What action, if any, the court will actually take in the event of non-compliance will be decided after the court has reviewed the evidence and heard from all the parties." (App. 5a, n.2). The District Court stated, however: "If called upon, this court intends, at this time, to achieve compliance by first exhausting the traditional civil-contempt process of levying fines." (App. 6a).

> week ..., with the amount of the fine perhaps to double at the beginning of each and every week thereafter...."

(App. 5a-6a).

Finally, the District Court stated in its final judgment and order that "[i]t is the initial obligation of the State of Alabama ... to remove the monument" either through the Chief Justice or "should he fail or be incapable of carrying out his duty under the rule of law, some other appropriate state official ... to remove it." (App. 6a). To that end, the District Court directed the United States Marshall "to serve personally a copy of this final judgment and injunction" on the Chief Justice and on "the Governor of the State of Alabama, the Attorney General of the State of Alabama, the Treasurer of the State of Alabama, the Comptroller of the State of Alabama, and the Alabama Administrative Director of Courts." (App. 6a-7a). The day following, the District Court, stating that it had "inadvertently omitted requiring service" "on each of the eight Associate Justices of the Alabama Supreme Court and on the Clerk of the Alabama Supreme Court," directed the United States Marshall to "personally serve a copy of the court's final judgment and injunction" upon them. (App. 9a).

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S FINAL JUDGMENT AND INJUNCTION VIOLATE THE ELEVENTH AMENDMENT

"'There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion ... than the issuing [of] an injunction.'" 11A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2942 (2d ed. 1995). Such "caution, deliberation, and sound discretion" was not exercised by the District Court on August 5 and 6, 2003 when it issued its final judgment and injunction Indeed, by design and effect, the District Court, by directing its final judgment and injunction **to the State of Alabama**, not just to Chief Justice Moore, violated the state's sovereign immunity guaranteed by Eleventh Amendment.

A. The Final Judgment and Injunction is Directed to the State of Alabama

At the time of entry of the final judgment and injunction, Chief Justice Moore was the only party defendant in these consolidated cases. (App. 15a). Yet, in its zeal to rebuff the Chief Justice's challenge to its authority and jurisdiction to issue an injunction against him, the District Court ordered "the State of Alabama ... to remove the monument" (App. 6a), disregarding the fundamental principle that equity courts act *in personam*, enforcing their decrees through the contempt power over the individual defendant over which it has obtained personal jurisdiction, not over the entity that such individual might represent. *See* H. McCormick, *Equity* § 34 (2d ed. 1948); W. Stafford, *Handbook of Equity,* ch. 6 (1934). This salutary rule limiting an equity court to jurisdiction over the person is

especially important in this case where, according to the District Court and the Court of Appeals, the constitutionality of the placement of the monument turned exclusively upon the actions taken, the words spoken, and the explanations given by the Chief Justice. *See, e.g.*, 229 F. Supp. 2d at 1299-1300, 1303, 1317-18 (App. 31a-34a, 40a-41a, 72a-74a); 335 F.3d 1282, 2003 WL 21499258, *14-16 (App. 119a-22a). While a District Court might look to the State to satisfy any monetary award imposed ancillary to its injunctive decree against a state officer acting in his official capacity (*see Hutto v. Finney*, 437 U.S. 678 (1978)), it may not transform an equity suit against such an official into one against the State. *See Kentucky v. Graham*, 473 U.S. 159, 169, n.18 (1985). To rule, as the District Court has in this case, that an injunction against a state officer acting in his official capacity is, in effect, an injunction against the state is in direct conflict with the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123 (1908); *Hans v. Louisiana*, 134 U.S. 1 (1890). *See also Kentucky v. Graham*, *supra*, at 167 n.14.

B. The Injunction Commands the Exercise of State Government Power

In its August 5 order, the District Court directed the United States Marshall "to serve personally a copy of this final judgement and injunction," not only on the Chief Justice, but on the Governor, the Attorney General, the Treasurer, the Comptroller, and the Administrative Director of Courts of the State of Alabama. (App. 6a-7a). By such service and by the terms of Rule 65(d) of the Federal Rules of Civil Procedure, the District Court has presumed that the Governor, the Attorney

General, the Treasurer and the Comptroller — all state officers in the executive branch — are either in "privity" with the Chief Justice or "in active concert or participation with [him]." (App. 147a). At the time of the issuance of the final judgment and injunction, there was absolutely no evidence that **any** member of the executive branch of the State of Alabama had actively participated in the placement of the monument, nor in the Chief Justice's decision to keep it there. Indeed, the District Court expressly found that the Chief Justice had unilaterally made the decision to install the monument without even forewarning his fellow supreme court justices. 229 F. Supp. 2d at 1294 (App. 20a). Notwithstanding such lack of evidence of "active concert" in the installation of the monument, the District Court, on August 6, 2003, directed the United States Marshall to serve the eight associate justices, as if said justices were now, by virtue of their positions, "in active concert or participation" with the Chief Justice to keep the monument in place!

Such an inference is possible only if one assumes — as the District Court apparently did — that the state officials, upon whom the August 5 and 6 final judgment and injunction have been personally served, have a duty to remove the monument. And that is precisely the premise upon which the District Court has operated, having issued its final judgment and injunction enjoining and restraining "persons in active concert or participation with [Chief Justice Moore] who receive actual notice of this injunction ... **from failing to remove**, by no later than August 20, 2003, the Ten Commandments monument." (App. 5a)(emphasis added). By positing its order upon a showing of "failing to remove," the District Court has presumed

that "active concert or participation" could be demonstrated by **inaction** by the state officials served.[3] After all, the District Court has explicitly ruled that "[i]t is the initial obligation of the State of Alabama ... to remove" the monument "acting through ... some ... appropriate state official," should Chief Justice Moore "fail or be incapable of carrying out his duty under the rule of law." (App. 6a). By ruling that the duty to remove is not just Chief Justice Moore's personally, but the State of Alabama's, the District Court's final judgment and injunction violates the very purpose of the Eleventh Amendment to prevent judicial intrusions forcing a sovereign state to exercise its governmental powers. *See Hans*, 134 U.S. at 21.

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[3] By serving the eight associate justices of the state supreme court, the District Court has placed each justice in jeopardy of civil contempt upon a finding by the District Court that the justice acted in "concert with" the Chief Justice in "failing to remove the monument" because the justice had a duty to attempt to remove the monument by the "power and authority" conferred upon the "justices of the Supreme Court ... to review, countermand, overrule, modify or amend any administrative decision by ... the Chief Justice." *See* Ala. Code of 1975, § 12-5-20. (Indeed, the state capitol's daily newspaper has already called the eight justices to take action to overrule the Chief Justice. Editorial, *Don't Snub Order: Did Moore Plan Confrontation?* Montgomery Advertiser, Aug. 12, 2003, at 9A.) It is constitutionally problematic, however, whether the associate justices on the court have the power to override the decision of the Chief Justice to place the monument in the state judicial building, because of the constitutional mandate that "[t]he chief justice of the supreme court **shall be** the administrative head of the judicial system." Ala. Const. of 1901, amend. 328, § 6.10 (App. 142a)(emphasis adde). *See Hornsby v. Sessions*, 703 So. 2d 932, 939 (Ala. 1997).

C. The Injunction Threatens the State Treasury and Removal of Chief Justice Moore from Office

Not only has the District Court waged war against the Eleventh Amendment's guarantee of Alabama's sovereign immunity by imposing a legal duty upon the State to remove the monument, but it has threatened to invade the Alabama treasury for billions of dollars in an effort to cower its officials into prompt compliance with the court's final judgment and injunction, as well as to provide a significant incentive for state officials to initiate proceedings to remove Chief Justice Moore from office. Even before any violation of that judgment and injunction has occurred, the District Court forecasted "the court's thinking as to how [it] will proceed if later there is an allegation that today's injunction has not been complied with." (App. 5a). Thus, the District Court announced that it "could levy substantial fines against Chief Justice Moore in his official capacity and, thus, against the State of Alabama itself, until the monument is removed." (App. 5a). It then provided an example of how "substantial" such fines might be:

> [T]he court could levy a fine of $5,000 a day for the first week ..., with the amount of the fine perhaps to double at the beginning of each and every week thereafter to the extent allowed by law and with the fine amount to be paid into the court at the end of each week, until there is full compliance with the order ....

(App. 6a).

To be sure, a District Court, generally, has the power **after** conducting civil contempt proceedings to levy an appropriate civil penalty as a means of securing compliance with its injunction, but it is a misuse of that power to announce **beforehand** what a court might do as a means of securing compliance with that injunction. As the Court of Appeals for the Eleventh Circuit has admonished the District Court in another case, a trial court should refrain from *sua sponte* taking any anticipatory remedial action:

> [I]njunctions ... are to be enforced through the district court's civil contempt power — exercised **after** (1) the plaintiff moves the court to order the defendant to show cause why he should not be held in contempt for refusing to obey the decree's mandate, (2) the court grants the motion, and (3) the defendant fails to present a lawful excuse for his alleged disobedience.

Reynolds v. Roberts, 207 F.3d 1288, 1297 (11th Cir. 2000) (emphasis added).

In an attempt to circumvent this limit upon its powers, the District Court below characterized its forecasted penalties as "just ... preliminary and only thoughts," claiming that "[w]hat action, if any, the court will actually take in the event of non-compliance will be decided after the court has reviewed the evidence and heard from all parties." (App. 5a, n.2). The District Court's disclaimer is disingenuous. If the District

Court's projected civil penalties were just "preliminary," as claimed, then they had no place in a "**Final** judgment and injunction." (*See* App. 2a)(emphasis added). And if "thoughts"are **really** "just thoughts," they should remain in the court's mind,[4] not placed in an official document memorializing **action** taken by the court.

In fact, the District Court's civil penalty projections were made, **not** as "preliminary thoughts," but as serious projections, because the court admitted that "[i]f called upon, this court **intends**, at this time, to achieve compliance by first exhausting the traditional civil-contempt process of levying fines," (App. 6a)(emphasis added). The District Court's formula of doubling the civil penalty each week, beginning with a fine of $5,000 per day for the first week, was well calculated to intimidate. While the first week's fines would total only $35,000, it does not take a trained mathematician to determine that by the end of the fifth (5th) week the total civil penalties projected by the court would exceed a million dollars, and by the end of the 15th week would exceed one billion dollars. In light of the state's current well-publicized fiscal straits,[5] the District Court's projected "costs" of noncompliance send a message to the state officers served to take direct action to remove the monument.

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[4] *See Webster's Third International Dictionary* 2381 (1964): "thought ... **1a** ...: the arranging of ideas in the mind..."

[5] *See, e.g.*, Press Release, Office of the Governor, *Governor Riley Cuts His Own Salary By Five Percent To Demonstrate Need To Save Taxpayer Dollars* (Mar. 18, 2003), *available at* http://governorpress.state.al.us/pr/pr-2003-03-18-4-salary.asp.

With the prospects of mammoth civil penalties payable by the State, the District Court's final judgment and injunction has provided a powerful incentive for Alabama state officials, also, to seriously consider the initiation of proceedings to remove Chief Justice Moore from office.[6] Under the Alabama Constitution, a Judicial Inquiry Commission, composed in part of persons appointed by the Governor, has the authority to:

> [C]onduct investigations ... concerning any judge ... of the judicial system of this state ... [to determine whether] a reasonable basis exists, (1) to charge a judge with violation of any Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to charge that the judge is physically or mentally unable to perform his or her duties.

Ala. Const. of 1901, amend. 581, § 6.17(b). If the Commission determines it has a reasonable basis for any such charge, then it may file a complaint with the Court of the Judiciary and seek an appropriate remedy, including removal, from that Court. Ala. Const. of 1901, amend. 581, § 6.18.

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[6] Already, the Montgomery Advertiser, the state capitol's daily newspaper, has called for action by the Judicial Inquiry Commission and the Court of Judiciary to "begin proceedings against" Chief Justice Moore if he should choose not to comply with the August 5 final judgment and injunction, citing as one reason the "cost" to the state for continuing the fight to keep the monument in the State Judicial Building. *See* Editorial, *Don't Snub Order: Did Moore Plan Confrontation?* Montgomery Advertiser, Aug. 12, 2003, at 9A.

D. The Injunction Threatens the Due Process Rights of Chief Justice Moore

There is no question that the Chief Justice, having been sued in his official capacity, has standing to press the sovereign immunity of the State of Alabama under the Eleventh Amendment. *Kentucky v. Graham*, 473 U.S. at 167. This is especially true in this case where the final judgment and injunction has been directed to the Attorney General of the State of Alabama as one who may be "in active concert or participation" with the Chief Justice in his effort to keep the monument in the State Judicial Building. (App. 5a). At the time of the order directing that the Attorney General be served, the District Court well knew that Chief Justice Moore was being represented by two Deputy Attorneys General of the State of Alabama, appointed by the Attorney General.

Until the issuance of the August 5 final judgment and injunction, the Chief Justice has received the full benefit of that legal representation without interference from the District Court. By directing the United States Marshall "to serve personally a copy of th[e] final judgment and injunction ... on the Attorney General" (App. 6a), however, the court has raised the specter of contempt should the Attorney General "fail" to exercise the power of his office to remove the monument. Unlike the Governor, the Treasurer, and the Comptroller of the State of Alabama, the Attorney General has no power over the state's fisc. And unlike the eight associate justices of the supreme court, the Attorney General has no direct responsibilities in the administration of justice in the courts.

But he does have responsibility to provide legal representation to the Chief Justice. The District Court's decision to serve the Attorney General with a copy of the final judgment undermines that representation, and therefore, threatens the due process rights of the Chief Justice. *See Maness v. Meyers*, 419 U.S. 449, 471-72 (1975)(Stewart, J., concurring).[7]

II. THE DISTRICT COURT HAS NO JURISDICTION TO ENJOIN CHIEF JUSTICE MOORE IN THIS CASE

Although the District Court found, in its initial November 18, 2002 judgment and order, that the monument violated the First Amendment Establishment Clause as applied to the States, it did not grant injunctive relief. Instead, the District Court issued a declaratory judgment that the monument violated the constitution, giving the Chief Justice 30 days to voluntarily remove it. 229 F. Supp. 2d at 1319 (App. 75a-76a). When the Chief Justice did not remove the monument within the stated period, the plaintiffs moved the court to issue an injunction requiring the removal of the monument. In response, the Chief Justice filed a memorandum in opposition, giving three distinct

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[7] Indeed, two days after the issuance of the August 5 order, one of plaintiffs' attorneys, the Americans United for Separation of Church and State, wrote a letter urging the Alabama Attorney General to fire the deputy attorneys general appointed to represent the Chief Justice. *See* Press Release, *Alabama Attorney General Should Fire Attorneys In Commandments Case, Says AU*, Aug. 8, 2003, *available at* http://www.au.org/press/pr030808.htm.

reasons why the District Court had neither the authority nor the jurisdiction to impose the requested injunction. First, citing Justice Brennan's concurring opinion in *McDaniel v. Paty*, 435 U.S. 618, 641-42 (1978), the Chief Justice asserted that any injunctive order requiring removal would impose an unconstitutional "religious test" upon the Chief Justice in violation of the Free Exercise Clause. Second, citing several recent opinions of this Court affirming the independence and sovereignty of the fifty states, the Chief Justice asserted that the right of the people of Alabama, and of a popularly elected Alabama official, to acknowledge God as the source of law and liberty is preserved by the Tenth Amendment. Third, relying upon the supremacy and oath clauses of Article VI of the Constitution, the Chief Justice maintained that he had taken an oath to "support" the United States Constitution, not a federal trial judge's opinion of that Constitution. Notwithstanding these objections, the District Court issued an injunction requiring removal of the monument. (App. 15a).

On appeal, the Chief Justice renewed all three objections to the District Court's judgment and injunction, but the Court of Appeals addressed only the third, dismissing it as no different from the arguments made by "southern governors who attempted to defy federal court orders during an earlier era." (App. 133a). Thus, the Court of Appeals concluded:

> The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. The chief justice of a state supreme court, of all people,

> should be expected to abide by that principle. We do expect that if he is unable to have the district court's order overturned through the usual appellate processes, when the time comes Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail.

335 F.3d 1282, 2003 WL 21499258, *21 (App. 135a).

Notwithstanding the Court of Appeals' ruling that "the rule of law ... require[s] that every person obey judicial orders **when all available means of appealing them have been exhausted**" (emphasis added), and notwithstanding the Chief Justice's opposition to the lifting of the District Court's stay of the injunction, the District Court lifted the stay and imposed the injunction, requiring removal of the monument no later than August 20, 2003, **before** the time expired for the Chief Justice to file a petition for certiorari in this case. In doing so, the District Court has, without exercising the "caution, deliberation, and sound discretion" that should accompany "the issuing [of] an injunction" (C. Wright, *supra,* at 44), prematurely precipitated a conflict with the Chief Justice's oath to support the Constitutions of the United States and the State of Alabama, necessitating this Court's exercise of its supervisory power over the District Court in aid of its appellate jurisdiction.

A. The Exercise of Federal Injunctive Power in Cases Arising Under the Constitution Requires a Uniform Rule

Since *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the exercise of judicial power by federal courts has been premised upon the principle of the "necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Id.* at 347-48. In recognition that judges — in that case state judges — "of equal learning and integrity, in different states, might differently interpret ... the constitution," there was need of a "revising authority to control these jarring and discordant judgments, and harmonize them into uniformity"; otherwise, "the constitution of the United States would be different in different states":

> The public mischiefs that would attend such a state of things would be truly deplorable [and] the appellate jurisdiction [of the Supreme Court] must continue to be the only adequate remedy for such evils.

Id. at 348.

For nearly thirty years, the Establishment Clause jurisprudence in the federal courts has been marked by "jarring and discordant" judgments, unharmonized by the exercise of the supervisory power of this Court. This has come about primarily because of the failure of this Court to provide any "fixed, per se rule." *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995). Although a majority of the justices has "expressed ... disapproval of the *Lemon* test,"[8] the test has

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[8] *Tangipahoa Parish Bd. of Ed. v. Freiler*, 530 U.S. 1251, 120 S. Ct. 2706, 2708 (Scalia, J., dissenting from a denial of certiorari).

survived. But its "checkered career in the decisional law of this Court" (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Scalia, J., dissenting)), has left in its wake confusion and conflict in the lower federal courts. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 804 (2000) ("[This] case's tortuous history ... indicates well the degree to which our Establishment Clause jurisprudence has shifted..., while nevertheless retaining anomalies with which the lower courts have had to struggle."); *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring)("[O]ur Establishment Clause jurisprudence is in hopeless disarray..."). This Court's assertion in *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984), that it is "unwilling[] ... to be confined to any single test" in the Establishment Clause area, has opened the door for federal courts to apply the three-part test of Lemon, the "endorsement test" of *County of Allegheny v. ACLU*, 492 U.S. 593 (1989), and the "coercion" test of *Lee v. Weisman,* 505 U.S. 577 (1992), as well as the historical test of *Marsh v. Chambers*, 463 U.S. 783 (1983). *See Mellen v. Bunting,* 327 F.3d 355 (4th Cir. 2003).

Not only has this Court produced multitudinous tests, the dominant *Lemon* test has been found by lower federal courts to be "murky" (*Freethought Soc. of Greater Phila. v. Chester County*, 334 F.3d 247, 256 (3d Cir. 2003)), "fuzzy" (*Boyajian v. Gatzuris*, 212 F. 3d 1, 11 (1st Cir. 2000)(Torruella, J., dissenting), "uncertain" (*Adland v. Russ*, 307 F.3d 471, 483 (6th Cir. 2002), and "no bright line." *King v. Richmond Co.*, 331 F.3d 1271, 1275 (11th Cir. 2003). Not surprisingly, the lower federal courts of appeals have crafted their own versions of *Lemon.* The Court of Appeals for the Third Circuit has

collapsed the first and second prongs of *Lemon* into an ultimate "endorsement test" (*Chester County*, 334 F.3d at 258), while the Fourth Circuit has left all original three prongs in tact. *See Bunting*, 327 F.3d at 372. The Eleventh Circuit has simply resigned itself, as it did in this case, that the Supreme Court has left the lower federal courts to decide Establishment Clause challenges "on a case-by-case basis with the result turning on the specific facts." 2003 WL 21499258, *6 (App. 102a). Indeed, that is precisely what this Court has done in the so-called "voluntary" school prayer cases. In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), this Court found the school prayer policy of a Texas school district to run afoul of the Establishment Clause, yet it declined to review an Eleventh Circuit Court of Appeals decision which, after considering *Santa Fe*, decided that a similar school prayer policy of a Georgia school district was not a forbidden establishment of religion. *See Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001), *cert. den.*, 534 U.S. 1065 (2001).

The Eleventh Circuit has taken this fact-intensive understanding of *Lemon* to mean that the "purpose inquiry is a factual one ... and on appeal we are obligated to accept the District Court's findings of fact unless they are clearly erroneous." 2003 WL 21499258, *15 (App. 121a).[9] In an area

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[9] Other Circuit Courts submit to *de novo* review the district court's factual findings under both prongs of the *Lemon* test. *See Adland*, 307 F.3d at 477. *See also May v. Cooperman*, 780 F.2d 240, 259 (3d Cir. 1985) (Becker, J., dissenting primarily upon the strength of *Bose Corp. v. Consumer's Union*, 466 U.S. 485 (1984)).

of constitutional law in which the hallmark is *ad hoc* adjudication, with the result turning on the specific facts, subject only to appellate review for "clear error," there can be no uniform rule of constitutional law throughout the United States as contemplated by Article VI of the United States Constitution. To permit a federal district judge, then, to enforce his opinion by a mandatory injunction does not serve the cause of uniformity. Rather, it perpetuates a system in which the Establishment Clause means one thing in one federal judicial district or circuit, and quite another elsewhere, in direct contradiction to the mandate of Article VI of the Constitution that "[t]his Constitution ... shall be the supreme law of the Land."

This disarray has come about because this Court has deliberately chosen an "Establishment Clause jurisprudence [that is] flexible," incapable of being "distilled into a fixed, per se rule." *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995)(O'Connor, J., concurring). In doing so, it has "abandoned" the rule of law, opting in favor of "the ... opinions of individuals." Thus, in the Establishment Clause arena, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *See Dred Scott v. Sandford*, 60 U.S. (How.) 393, 621 (1856)(Curtis, J., dissenting). To permit the District Court to enforce an injunction against Chief Justice Moore, then, is not justified by the "rule of law," as maintained by the Court of Appeals, but is a mockery of that rule.

B. The Chief Justice's Position on His Oath is Not the Same as the Southern Governors

Without attempting to examine this Court's precedents governing racial discrimination in the 1960's, and this Court's precedents governing the Establishment Clause in the 1990's and 2000's, the Court of Appeals blithely assumed that the Chief Justice's position on the constitutional limits upon the exercise of federal judicial power was absolutely no different from the one taken by "southern governors who attempted to defy federal court orders during an earlier era." (*See* App. 133a). The Court of Appeals was seriously mistaken.

In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court laid down a "bright-line rule," concluding that "[s]eparate educational facilities are inherently unequal." *Id.* at 495. Thus, in a series of terse *per curiam* opinions, this Court held unconstitutional segregation in a wide variety of areas, including public beaches and bathhouses (*Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955)), municipal golf courses (*Holmes v. City of Atlanta*, 350 U.S. 879 (1955)), and buses. *Gayle v. Browder*, 352 U.S. 903 (1956). The constitutional principle of no race discrimination was clear and certain, with only the means of implementing the principle turning on the facts and circumstances of a case. *See Brown v. Board of Education*, 349 U.S. 294 (1955). Thus, the rule of *Cooper v. Aaron*, 358 U.S. 1 (1958), wherein this Court stated that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land," and therefore, binding upon "[e]very state legislator and executive

and judicial officer" (*id.* at 1410), is necessarily limited to this Court's opinions setting forth a "bright-line" rule. Therefore, *Cooper* does not govern Establishment Clause cases that are decided "case-by-case," in which a trial judge's factual findings are binding unless "clearly erroneous."

To read *Cooper v. Aaron,* and the 1960's civil rights legacy, to have established a blanket rule that a state officer must obey every order of any federal court would emasculate the independence and sovereignty of the states guaranteed by the Tenth Amendment, and undermine the integrity of a state official's Article VI oath swearing fidelity to the "Constitution [as the] supreme law of the land," not to any particular federal judge's opinion of that Constitution.

C. The Exercise of Federal Judicial Power is Subject to Federalist Checks and Balances

As stated in *Marbury v. Madison*, 1 Cranch 137, 177 (1803), "[i]t is ... the province and the duty of the [federal] judicial department to say what the law is." That power, however, is subject to external checks and balances. As Alexander Hamilton put it in *Federalist* 78, "[t]he judiciary ... has ... neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

The federal courts are not only limited as to **how** they may ensure compliance with their opinions, but **against whom** such compliance may be demanded. For instance, this Court recently

chastised a District Court for entering an injunction against the President of the United States, reminding the lower court that even the Supreme Court "'has no jurisdiction of a bill to enjoin the President in the performance of his official duties.' *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866)":

> While injunctive relief against executive officials like the Secretary of Commerce is within the court's power, see *Youngstown Sheet & Tube Co. v. Sawyer, supra,* the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows.

Franklin v. Massachusetts, 505 U.S. 788, 802 (1992). After all, Article II of the United States Constitution vests the executive power of the federal government in the President, including the power to "take [c]are that the [l]aws be faithfully executed," which must be left to the discretion of the President without threat of a court's contempt power should the President find a judicial order contrary to law. *See id.* at 826-29 (Scalia, J., concurring).

Similarly, a federal district court may not presume, through the issuance of an injunction,[10] to direct the head of Alabama's

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[10] The fact that the District Court may not issue an injunction against Chief Justice Moore does not elevate the Chief Justice "above the law." "It is simply error to characterize an official as 'above the law' because a particular remedy is not available against him." *Nixon v. Fitzgerald*, 457 U.S. 731, 758 n.41 (1982).

judicial branch, the Chief Justice, in the discretionary execution of his duties. Chief Justice Moore, as administrative head of the Alabama Judicial System, is charged with the duty to "[t]o take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state." Ala. Code of 1975, § 12-2-30(b)(7). When the Alabama justice system was established in the Alabama Constitution, the people of the State declared: "We, the people ..., **in order to establish justice ..., invoking the favor and guidance of Almighty God,** do ordain and establish the following Constitution and form of government for the State of Alabama." Ala. Const. of 1901, pmbl. (emphasis added). In accordance with his duty to act for the "orderly administration of justice," Chief Justice Moore, through the monument portraying the "moral foundation of law," has recognized that same "Almighty God" Whose "favor and guidance" the people of Alabama petitioned when their justice system was formed.

In ordering the removal of the monument, the District Court is not commanding Chief Justice Moore to fulfill a ministerial duty, such as would be a permissible exercise of judicial power even in a case against the President. *See Mississippi*, 71 U.S. at 498. This does not suggest in any way that the Chief Justice's action placing the monument in the State Judicial Building is unreviewable by a federal court. Rather, as is the case with both the President and Congress, review of the legality of the Chief Justice's placement of the monument must be obtained in a suit seeking to enjoin a subordinate ministerial officer who is enforcing the Chief Justice's directive. *Cf. Franklin*, 505 U.S. 828-29 (Scalia, J., concurring). But to seek to enjoin the Chief

Justice himself, the highest judicial officer of the State, like a suit to enjoin the President in the performance of his official duties, "might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'" *Mississippi*, 71 U.S. at 499.

The District Court's injunction against Chief Justice Moore not only **redefines** the Chief Justice's duty under his oath, but **directs compliance** by the Chief Justice with the District Court's interpretation of the Chief Justice's oath of office. But it is the **Chief Justice**, **not** the District Court, who took the oath "[to] support the Constitution of the United States, and the Constitution of the State of Alabama" and to "faithfully and honestly discharge the duties of the office" of chief justice of the State of Alabama, "[s]o help me God." U.S. Const. art. VI; Ala. Const. of 1901, Art. XVI, § 279. For the District Court to enjoin Chief Justice Moore in the performance of his official duties—in this case, to order him to remove a monument placed in accordance with Alabama statutory and constitutional provisions—would force Chief Justice Moore to violate his oath of office.

Finally, the District Court's final judgment and injunction abridges the right of the people, through their elected representative — the Chief Justice — to acknowledge God as indispensable to the administration of justice, as stated in the Preamble to the State Constitution. The Tenth Amendment reserves to the people of the State of Alabama the right to constitute their state government under God, and there is nothing in the Establishment Clause that prohibits the people

through their elected representatives from identifying who that God is. By acknowledging God's law as the "moral foundation" of the law of the State of Alabama through the medium of the monument, the Chief Justice has done no more than restate the truth contained in Alabama's constitutional preamble.

CONCLUSION

For the foregoing reasons, petitioner prays:

1. That a writ of mandamus issue from this Court directed to the Honorable Myron H. Thompson of the United States District Court for the Middle District of Alabama, Northern Division, requiring Judge Thompson to show cause on a day to be fixed by this Court why a writ of mandamus should not issue from this Court directing Judge Thompson to vacate and expunge from the record the order of August 5 and 6 unlawfully ordering Alabama Chief Justice Roy Moore to remove the monument at issue by no later than August 20, 2003, or in the alternative, why a writ of prohibition should not issue to prevent the enforcement of said judgment and order.

2. That petitioner have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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August 15, 2003

APPENDIX

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN R. GLASSROTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1268-N
	)	
ROY S. MOORE, Chief Justice of the Alabama Supreme Court,	)	
	)	
	)	
Defendant.	)	
	)	
	)	
MELINDA MADDOX and BEVERLY HOWARD,	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1269-N
	)	
ROY MOORE, in his official capacity,	)	
	)	
	)	
Defendant.	)	

FINAL JUDGMENT AND INJUNCTION

On November 18, 2002, this court entered an opinion and judgment holding that defendant Roy S. Moore, Chief Justice of the Alabama Supreme Court, violated the Establishment Clause of the First Amendment to the United States Constitution by placing a Ten Commandments monument in the rotunda of the Alabama State Judicial Building. Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002). Chief Justice Moore was given [*2] thirty days to remove the monument voluntarily, and he failed to do so.

On December 19, 2002, the court issued a permanent injunction requiring the Chief Justice to remove the monument by January 3, 2003. Glassroth v. Moore, 242 F. Supp. 2d 1067 (M.D. Ala. 2002). On that same day, December 19, the Chief Justice filed a notice of appeal and moved the court to stay its injunction pending appeal. On December 23, the court granted the stay, noting that it

> "does not discount the harm to the plaintiffs in allowing the monument to remain pending appeal of this case, nor does the court discount the public interest in having the unconstitutional actions by the Chief Justice remedied forthwith. Therefore, the court emphasizes that, upon receipt of an appellate mandate affirming this court's decision and injunction, the court will immediately lift the stay and enter another injunction, along the lines of the December 19 injunction, requiring the removal of the Ten Commandments monument within fifteen days."

Glassroth v. Moore, 242 F. Supp. 2d 1068, 1070 (M.D. Ala. 2002).

On July 1, 2003, the Eleventh Circuit Court of Appeals affirmed this court's November 18 judgment that the Chief Justice violated the Establishment Clause by placing the Ten [*3] Commandments monument in the Judicial Building rotunda. Glassroth v. Moore, ___ F.3d ___, 2003 WL 21499258 (11th Cir. 2003).

On July 28, before receipt of the appellate mandate, this court held a conference call to determine if the Chief Justice had asked the Eleventh Circuit to stay its mandate pursuant to Rule 41(d)(2)(A) of the Federal Rules of Appellate Procedure, which provides that, "A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court." The court scheduled the conference out of concern that the mandate might issue while the undersigned was away on a family matter. During the call, counsel for the Chief Justice indicated that, although the Chief Justice was aware of Rule 41, he had not filed such a motion.

Two days later, on July 30, the Eleventh Circuit issued its mandate, and, on August 1, this court received it. Thus, although the Chief Justice could have requested a stay of the mandate (and thereby of the injunction the court enters today) pending a request for review by the United States Supreme Court, the Chief Justice chose, for reasons not made known to this court, not to do so.

[*4] On August 4, this court held another conference call to determine if the parties had any opposition to the court carrying out the mandate and lifting its stay. Although the court

had made clear in its December 23 order that the stay would be lifted immediately upon receipt of the appellate mandate, the court wanted to give all parties a final opportunity to voice any concerns. In a written response filed after the call, the Chief Justice stated that he opposes the lifting of the stay and the issuance of an injunction "on the grounds that the Court does not have the authority or jurisdiction to enter an injunction in this case." Of course, the Chief Justice's argument has already been rejected by both this court, Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), and the Eleventh Circuit, Glassroth v. Moore, ___ F.3d ___, 2003 WL 21499258 (11th Cir. 2003). But most notably, the Chief Justice took the same stance in this court as he had in the Eleventh Circuit by not expressly asking that the stay be continued pending any effort to obtain review in the United States Supreme Court.[1] [*5]

Having found that defendant Roy S. Moore, Chief Justice of the Alabama Supreme Court, violated the Establishment Clause of the First Amendment to the United State Constitution by placing a Ten Commandments monument in the rotunda of the Alabama State Judicial Building, and because the Chief Justice did not ask, either in the Eleventh Circuit or in this court, for a stay of the injunction pending application for a writ of certiorari in the Supreme Court, it is the ORDER, JUDGMENT and DECREE of the court as follows:

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[1] Admittedly, because the Chief Justice did not ask the Eleventh Circuit for a stay of its mandate pursuant to Rule 41 and because this court has no authority, absent extraordinary circumstances, to vary from an appellate mandate, Piambino v.[*5] Bailey, 757 F.2d 1112, 1119 (11th Cir. 1985), it is debatable whether this court would have had the discretion to grant a stay even if the Chief Justice had requested one. The court need not reach this issue, however.

(1) The stay of this court's injunction, entered December 23, 2002 (Doc. no. 167), is lifted and dissolved.

(2) Defendant Roy S. Moore, his officers, agents, servants, and employees, and those persons in active concert or participation with him who receive actual notice of this injunction, be and they are each ENJOINED and RESTRAINED from failing to remove, by no later than August 20, 2003, the Ten Commandments monument at issue in this litigation from the non-private areas of the Alabama State Judicial Building. In other words, this injunction does not reach areas maintained, [*6] in good faith, as private in the Judicial Building, such as a justice's chambers.

Finally, in view of the Chief Justice's recent reassertion that this court does not have the authority or jurisdiction to enter an injunction in this case, an argument already rejected by this court and the Eleventh Circuit, this court believes it appropriate to provide the parties with some preliminary idea of the court's thinking as to how the court will proceed if later there is an allegation that today's injunction has not been complied with within the time allowed.[2] If the plaintiffs file a motion for civil contempt, the court will immediately issue a show-cause order. If, based on the show-cause-order response and the evidence presented at a hearing, there is a finding of civil contempt, the court could levy substantial fines against Chief Justice Moore in his official capacity and, thus, against the State of Alabama itself, until the monument is removed. Kentucky v. Graham,

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[2] These preliminary thoughts are just that: preliminary and only thoughts. What action, if any, the court will actually take in the event of non-compliance will be decided after the court has reviewed the evidence and heard from all parties.

473 U.S. 159, 166, 105 S. Ct. 3099, 3105 (1985) ("an official-capacity suit is, in all respects other than name, to [*7] be treated as a suit against the entity"). For example, the court could levy a fine of $5,000 a day for the first week (that is, for each of the first seven days), with the amount of the fine perhaps to double at the beginning of each and every week thereafter to the extent allowed by law and with the fine amount to be paid into the court at the end of each week, until there is full compliance with the order the court enters today.

It is the initial obligation of the State of Alabama, not this court and not any federal official, to remove the monument. Because the Chief Justice accepted the monument, and has maintained it in the Alabama Judicial Building, in his capacity as a state official, it is the obligation of the State of Alabama (acting through the Chief Justice and, should he fail or be incapable of carrying out his duty under the rule of law, some other appropriate state official) to remove it. The court, at this time, does not envision a scenario in which there would be an opportunity for any physical confrontation between federal and state officials or between federal officials and anyone else. If called upon, this court intends, at this time, to achieve compliance by first [*8] exhausting the traditional civil-contempt process of levying fines.

The clerk of the court is DIRECTED to issue a writ of injunction.

The United States Marshall is DIRECTED to serve personally a copy of this final judgment and injunction on defendant Roy S. Moore, Chief Justice of the Alabama Supreme Court, and on the following additional state officials: the Governor of the State of Alabama, the Attorney General of the

State of Alabama, the Treasurer of the State of Alabama, the Comptroller of the State of Alabama, and the Alabama Administrative Director of Courts.

Furthermore, the clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Done this the 5th day of August, 2003.

MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN R. GLASSROTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1268-N
	)	
ROY S. MOORE, Chief Justice of the Alabama Supreme Court,	)	
	)	
	)	
Defendant.	)	
	)	
	)	
MELINDA MADDOX and BEVERLY HOWARD,	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1269-N
	)	
ROY MOORE, in his official capacity,	)	
	)	
	)	
Defendant.	)	

ORDER

It is ORDERED that the United States Marshall personally serve a copy of the court's final judgment and injunction and companion writ, entered on August 5, 2003 (Doc. nos. 226 & 227), on each of the eight Associate Justices of the Alabama Supreme Court and on the Clerk of the Alabama Supreme Court. In its final judgment and injunction, the court inadvertently omitted requiring service on [*2] these state officials.

DONE, this 6th day of August, 2003.

MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

242 F. Supp. 2d 1068

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN R. GLASSROTH,	)
	)
Plaintiff,	)
	)
v.	) CIVIL ACTION NO.
	) 01-T-1268-N
	)
ROY S. MOORE, Chief Justice	)
of the Alabama Supreme Court,	)
	)
Defendant.	)
	)
	)
MELINDA MADDOX and	)
BEVERLY HOWARD,	)
	)
Plaintiffs,	)
	)
v.	) CIVIL ACTION NO.
	) 01-T-1269-N
	)
ROY MOORE,	)
in his official capacity,	)
	)
Defendant.	)

ORDER

On November 18, 2002, this court held that defendant Roy S. Moore, Chief Justice of the Alabama Supreme Court, violated the Establishment Clause of the First Amendment to the United States Constitution by placing a Ten Commandments monument in the rotunda of the Alabama State Judicial Building. Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala.2002). Chief Justice Moore was given thirty days to remove the monument voluntarily, and he failed to do so. On December 19, 2002, the court issued a permanent injunction requiring the Chief Justice to remove the monument by January 3, 2003. Glassroth v. Moore, 242 F. Supp. 2d 1067 (M.D. Ala.2002). On that same day, the Chief Justice filed a notice of appeal from that injunction. Currently before the court is the Chief Justice's motion asking that the court stay the injunction, pursuant to Fed. R. Civ. P. 62(c), while the case is pending on appeal. The motion will be granted.

Four factors inform a trial court's decision whether to stay an injunction: (1) the applicant's likelihood of prevailing on the merits of the appeal; (2) whether the applicant will suffer irreparable damage absent a stay; (3) the harm that the other parties will suffer if a stay is granted; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L.Ed.2d 724 (1987); United States v. Bogle, 855 F.2d 707, 708 (11th Cir. 1988). These factors, however, should not be applied as "a set of rigid rules," Hilton, 481 U.S. at 777, 107 S. Ct. at 2119; rather these "traditional stay factors contemplate individualized judgments in each case." Id. For example, when the "balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay," only a "substantial case on the merits" is necessary to satisfy the first

factor. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir.1986).

For the reasons given in the November 18 opinion, the court does not believe that the Chief Justice has presented even a substantial case on the merits. Additionally, the Chief Justice cannot show he will suffer irreparable harm unless the injunction is stayed, because the monument can be easily returned if this court's decision is reversed. Nevertheless, the court is convinced that a stay is warranted based on the other two factors of the stay inquiry.

It is almost certain that the Eleventh Circuit Court of Appeals would grant a temporary or short stay, at the very least, in order to have adequate time to consider whether a longer stay pending appeal should be granted. To review this court's denial or grant of a stay, the appellate court would need beyond the January 3 deadline to review the record to determine, among other things, whether this court's decision that the Chief Justice does not have a substantial case for appeal is correct. Indeed, if this court were sitting as an appellate court unfamiliar with the record, the undersigned (as a member of that court) would counsel granting a temporary stay for this reason. Therefore, aside from the issue of the merits of this case, there is no realistic likelihood that the monument will be removed by January 3; this court and the parties are looking at a date beyond the January 3 deadline before the Eleventh Circuit can even determine whether a stay pending appeal is warranted. Moreover, if an expedited review on the merits is feasible, there is also a strong likelihood that the appellate court would delay reaching the merits on the stay issue and would simply address them on the final appeal.

To be sure, the plaintiffs will suffer continuing irreparable harm pending the appeal. See Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983) (same). But this case does not present a circumstance where the magnitude of the harm requires the appellate court to shoot from the hip, such as a life-or-death situation or a situation where to delay a decision on relief pending appeal would leave a party without relief at all.

The court, therefore, finds that the plaintiffs', as well as the public's, main goal of the vindication of the First Amendment through the expeditious and orderly removal of the monument would be better furthered by expeditious appellate review of the case on its merits. The plaintiffs did not seek a preliminary injunction in this court; instead, the parties and this court devoted their time and resources to expedited preparation and consideration of the merits of the case. This case was, therefore, litigated in a little over a year, including the development of a complete record, the holding of a week-long trial, and the issuance of a judgment. Moreover, the appellate record is now almost complete. There is no reason why the Eleventh Circuit, if it were to choose, could not similarly expedite its review. Toward this end, the parties should devote their immediate time and resources to an expedited appellate review of the case on the merits rather than whether a stay should be granted.

Finally, it should be repeated that the court does not discount the harm to the plaintiffs in allowing the monument to remain pending appeal of this case, nor does the court discount

the public interest in having the unconstitutional actions by the Chief Justice remedied forthwith. Therefore, the court emphasizes that, upon receipt of an appellate mandate affirming this court's decision and injunction, the court will immediately lift the stay and enter another injunction, along the lines of the December 19 injunction, requiring the removal of the Ten Commandments monument within fifteen days.

According, it is ORDERED that the motion for a stay of the injunction pending appeal, filed by defendant Roy S. Moore on December 19, 2002 (Doc. no. 163), is granted.

242 F. Supp. 2d 1067

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN R. GLASSROTH,	)
	)
Plaintiff,	)
	)
v.	) CIVIL ACTION NO.
	) 01-T-1268-N
	)
ROY S. MOORE, Chief Justice of the Alabama Supreme Court,	)
	)
Defendant.	)
	)
	)
MELINDA MADDOX and BEVERLY HOWARD,	)
	)
Plaintiffs,	)
	)
v.	) CIVIL ACTION NO.
	) 01-T-1269-N
	)
ROY MOORE, in his official capacity,	)
	)
Defendant.	)

Dec. 19, 2002

FINAL JUDGMENT AND INJUNCTION

In accordance with the memorandum opinion entered November 18, 2002 (Doc. no. 138), and because defendant Roy S. Moore has declined to remove the Ten Commandments monument within the 30 days allowed for him to remove it voluntarily, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The motion for entry of permanent injunction, filed by plaintiffs on December 6, 2002 (Doc. no. 149), is granted.

(2) Defendant Roy S. Moore, his officers, agents, servants, and employees, and those persons in active concert or participation with him who receive actual notice of this injunction, be and they are each hereby ENJOINED and RESTRAINED from failing to remove, by no later than January 3, 2003, the Ten Commandments monument at issue in this litigation from the non-private areas of the Alabama State Judicial Building. In other words, this injunction does not reach areas maintained, in good faith, as private in the Judicial Building, such as a justice's chambers.

The clerk of the court is DIRECTED to issue a writ of injunction.

Furthermore, the clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

229 F. Supp. 2d 1290

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN R. GLASSROTH, Plaintiff, v. ROY S. MOORE, Chief Justice of the Alabama Supreme Court, Defendant.	)	CIVIL ACTION NO. 01-T-1268-N
MELINDA MADDOX and BEVERLY HOWARD, Plaintiffs, v. ROY MOORE, in his official capacity, Defendant.	)	CIVIL ACTION NO. 01-T-1269-N

OPINION

The Establishment Clause of the First Amendment, made binding upon the States through the Fourteenth Amendment to the United States Constitution, provides that government "shall make no law respecting an establishment of religion." The question presented to this court is whether the Chief Justice of the Alabama Supreme Court violated the Establishment Clause when he placed a slightly over two-and-a-half ton granite monument--engraved with the Ten Commandments and other references to God--in the Alabama State Judicial Building with the specific purpose and effect, as the court finds from the evidence, of acknowledging the Judeo-Christian God as the moral foundation of our laws. To answer this question, the court applies two Supreme Court precedents: Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971), and Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983).

Based on the evidence presented during a week-long trial and for the reasons that follow, this court holds that the evidence is overwhelming and the law is clear that the Chief Justice violated the Establishment Clause. But, in announcing this holding today, the court believes it is important to clarify at the outset that the court does not hold that it is improper in all instances to display the Ten Commandments in government buildings; nor does the court hold that the Ten Commandments are not important, if not one of the most important, sources of American law. Rather the court's limited holding, as will be explained below in more detail, is that the Chief Justice's actions and intentions in this case crossed the Establishment

Clause line between the permissible and the impermissible.

I.

The plaintiffs in these two consolidated lawsuits are Stephen R. Glassroth, Melinda Maddox, and Beverly Howard. The defendant is Roy S. Moore, Chief Justice of the Alabama Supreme Court. The plaintiffs seek enforcement of the First and Fourteenth Amendments to the United States Constitution through 42 U.S.C.A. § 1983. The court's jurisdiction has been properly invoked pursuant to 28 U.S.C.A. §§ 1331 (federal question) and 1343(a)(3) (civil rights).

The events giving rise to this litigation go back several years. As a state court judge in Gadsden, Alabama, then-Judge Moore displayed a hand-carved plaque of the Ten Commandments in his courtroom. He also invited clergy to lead prayer in his courtroom before trials. These acts led to two highly publicized lawsuits involving the American Civil Liberties Union of Alabama. The first, brought in March 1995, was dismissed for lack of standing. See Alabama Freethought Ass'n v. Moore, 893 F. Supp. 1522 (N.D. Ala. 1995). The second, brought in April 1995 by the State of Alabama, sought a declaratory judgment that Judge Moore's display of the Ten Commandments was constitutional; that lawsuit was dismissed by the Alabama Supreme Court as nonjusticiable. See Alabama ex rel. James v. ACLU of Alabama, 711 So. 2d 952 (Ala. 1998). A large part of Judge Moore's funding for these lawsuits--$170,000--came from Coral Ridge Ministries, an evangelical Christian media outreach organization with

television and radio broadcasts that cover all major Alabama cities.

On November 7, 2000, Judge Moore was elected Chief Justice of the Alabama Supreme Court. During his campaign for Chief Justice, Judge Moore capitalized on the name recognition that he had obtained during the 1995 lawsuits. Judge Moore's campaign referred to him as the "Ten Commandments Judge," and virtually everything put out by the campaign referenced the Ten Commandments. Shortly after his election, now-Chief Justice began designing a monument depicting, in his words, "the moral foundation of law" and reflecting "the sovereignty of God over the affairs of men." By God, the Chief Justice specifically meant the Judeo-Christian God of the Holy Bible and not the God of any other religion.

On August 1, 2001, Chief Justice Moore unveiled a 5,280-pound granite monument in the large colonnaded rotunda of the Alabama State Judicial Building, which houses the Alabama Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, the state law library, and the Alabama Administrative Office of Courts. Coral Ridge Ministries filmed both the monument's installation, which occurred the night before, and its unveiling; it was the only media outlet to film either occasion. The Chief Justice installed the monument with neither the approval nor the knowledge of the Alabama Supreme Court's other eight justices. He made all final decisions with regard to the specific language appearing on the monument, as well as its size, shape, color, and location within the Judicial Building. No tax dollars were used in the

monument's construction or installation. Chief Justice Moore has final authority over what decorations may be placed in the Judicial Building rotunda.

The monument is located directly across from the main entrance to the Judicial Building, in front of a large plate-glass window, with a courtyard and waterfall behind it. The monument and the area surrounding it are roped off. A person entering the Judicial Building through its main entrance, and looking across the large open area of the rotunda, will see the monument immediately. The Judicial Building's public stairwell, public elevator, and law library are all accessed through the rotunda. Anyone who uses the public bathrooms in the Judicial Building rotunda must walk by the monument. The Chief Justice chose to display the monument in this location so that visitors to the Alabama Supreme Court would see the monument. While not in its center, the monument is the centerpiece of the rotunda.

The monument is in the shape of a cube, approximately three feet wide by three feet deep by four feet tall. The top of the monument is carved as two tablets with rounded tops, the common depiction of the Ten Commandments; these tablets slope toward a person viewing the monument from the front. The tablets are engraved with the Ten Commandments as excerpted from the Book of Exodus in the King James Bible. Due to the slope of the monument's top and the religious appearance of the tablets, the tablets call to mind an open Bible resting on a podium. A picture of the front view of the monument is attached as Appendix A to this opinion.

Engraved on the left tablet is: "I am the Lord thy God"; "Thou shalt have no other Gods before me"; "Thou shalt not make unto thee any graven image"; "Thou shalt not take the name of the Lord thy God in vain"; and "Remember the sabbath day, to keep it holy." Engraved on the right tablet is: "Honour thy father and thy mother"; "Thou shalt not kill"; "Thou shalt not commit adultery"; "Thou shalt not steal"; "Thou shalt not bear false witness"; and "Thou shalt not covet." In addition, the four sides of the monument are engraved with fourteen quotations from various secular sources; these sources are identified on the monument to the extent that each quotation is accompanied by the name of a document or an individual. On each side of the monument, one of the quotations is larger than the others and is set apart in relief. The smaller quotations on each side are intended to relate to that larger quotation. The north (front) side of the monument has a large quotation from the Declaration of Independence, "Laws of nature and of nature's God," and smaller quotations from George Mason, James Madison, and William Blackstone that speak of the relationship between nature's laws and God's laws. The large quotation on the west (right) side of the monument is the National Motto, "In God We Trust"; the smaller quotations on that side were excerpted from the Preamble to the Alabama Constitution and the fourth verse of the National Anthem. The south (back) side of the monument bears a large quotation from the Judiciary Act of 1789, "So help me God," and smaller quotations from George Washington and John Jay speaking of oaths and justice. The east (left) side of the monument has a large quotation from the Pledge of Allegiance 1954, "One nation under God, indivisible, with liberty and justice for all,"

and smaller quotations from the legislative history of the Pledge, James Wilson, and Thomas Jefferson suggesting that both liberty and morality are based on God's authority. The full quotations from all four sides of the monument are attached as Appendix B to this opinion.

Additionally, at the request of the parties, the court visited the monument before beginning trial because all agreed that a personal on-site viewing of the monument was essential to capture fully not only the monument but its context as well. The court found the monument to be, indeed, much more than the sum of its notable quotations, large measurements, and prominent location. The court was captivated by not just the solemn ambience of the rotunda (as is often true with judicial buildings), but by something much more sublime; there was the sense of being in the presence of something not just valued and revered (such as an historical document) but also holy and sacred. Thus, it was not surprising to the court that, in describing at the process of designing the monument, the Chief Justice emphasized that the secular quotations were placed on the sides of the monument, rather than on its top, because these statements were the words of mere men and could not be placed on the same plane as the Word of God. Nor was it surprising to the court that, as the evidence reflected, visitors and building employees consider the monument an appropriate, and even compelling, place for prayer. The court is impressed that the monument and its immediate surroundings are, in essence, a consecrated place, a religious sanctuary, within the walls of a courthouse.

At the monument's unveiling ceremony, Chief Justice Moore made a speech noting that the monument depicted the "moral foundation of law." But consistent with the impression the court had when it viewed the monument and consistent with his intent to design the monument to emphasize the preeminence of God's Word, the Chief Justice made clear the monument was ultimately a monument to the giver of this moral foundation, the Judeo-Christian God, and, in particular, to his sovereignty over all the affairs of men. He explained that the monument "serves to remind the Appellate Courts and judges of the Circuit and District Court of this State and members of the bar who appear before them, as well as the people of Alabama who visit the Alabama Judicial Building, of the truth stated in the Preamble to the Alabama Constitution that in order to establish justice we must invoke 'the favor and guidance of almighty God.'" The Chief Justice expressed his disagreement with those judges and other government officials who "purport that it is government--and not God--who gave us our rights." He said that these officials have "turned away from those absolute standards that serve as the moral foundation of law." In the Chief Justice's opinion, to restore this moral foundation of law, "we must first recognize the source from which all morality springs ... [by] recogniz[ing] the sovereignty of God." Finally, the Chief Justice said that he hoped that "this day marks the beginning of the restoration of the moral foundation of law to our people and a return to the knowledge of God in our land." Because of its importance to this litigation, a transcript of the Chief Justice's entire speech is attached as Appendix C to this opinion.

At the time of its installation, the monument was intended to be the only object decorating the Judicial Building rotunda. Almost two months later, though, the Chief Justice added two more displays to the rotunda. The first, added in late September, is a marble plaque with quotations from Rev. Dr. Martin Luther King, Jr., speaking of just and unjust laws, and Frederick Douglass, speaking of the injustice of slavery, entitled "Moral Foundation of Law." The Chief Justice commissioned this plaque himself. The moral foundation of law plaque is forty-two inches by thirty-two inches and is located on a wall seventy-five feet away from the monument. The Chief Justice installed this plaque because the contributions of these men "have been significant and their reliance upon the laws of God to secure freedom and liberty should be recognized and would support the very purpose of the Ten Commandments monument." The full text of this plaque is attached as Appendix D to this opinion.

Added in early October, the second display is a brass plaque with the Bill of Rights to the United States Constitution. This plaque was discovered in a box in the Judicial Building shortly before it was put on another wall in the rotunda. It, too, is located on the wall, seventy-five feet from the monument; this plaque is thirty inches by thirty-six inches. The Chief Justice testified that this plaque was placed in the rotunda because it also comported with the "moral foundation of law" theme.

No sign indicates that the monument is connected with or related to these plaques. A person standing directly in front

of the monument cannot see either plaque. Indeed, unlike the monument, the plaques are behind the rotunda colonnade. Visitors to the Judicial Building could easily miss or overlook the plaques. Indeed, in their written submissions to the court, the Chief Justice's attorneys described the plaques as "inconspicuous." At trial, and long after plaintiffs' attorneys had in their own submissions specifically noted this concession, the Chief Justice's attorneys said that they had misspoken and intended to describe the plaques as "conspicuous." Having seen the plaques, the court agrees with the Chief Justice's attorneys' first description of the plaques, intended or not.

Others have requested that the Chief Justice add additional items to the rotunda, requests that the Chief Justice has denied because the proposed items did not comport with the moral foundation of law theme. Alabama State Representative Alvin Holmes requested the inclusion of a monument containing Rev. Dr. Martin Luther King, Jr.'s "I Have a Dream" speech, a request that the Chief Justice denied. In denying this request, the Chief Justice stated, "The placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument." Additionally, an atheist group's request to display a sculpture of an atheist symbol--an atom--was denied by the Chief Justice as inconsistent with the rotunda's theme.

II.

A.

Chief Justice Moore argues that these two lawsuits should be dismissed because the plaintiffs do not have standing to bring them. The Supreme Court has held that, at "an irreducible minimum," a person seeking to invoke a court's authority must have standing, that is, must be able to "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 472, 102 S. Ct. 752, 758 (1982) (citations omitted). To have standing to challenge a display under the Establishment Clause, the plaintiffs must suffer personal injury "as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." Id. at 485, 102 S. Ct. at 765 (emphasis in original). The personal injury may be noneconomic in nature. Id. at 486, 102 S. Ct. at 766. An "effect on an individual's use and enjoyment of public land is a sufficient noneconomic injury to confer standing to challenge governmental actions." ACLU of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1105 (11th Cir. 1983).

All three plaintiffs are attorneys who regularly practice law in Alabama's courts. Each has testified that he or she has come into direct contact with the monument on multiple

occasions, and each expects to do so in the future as a result of his or her professional obligations. Each finds the monument offensive, and each has said the monument makes him or her feel like an "outsider." Furthermore, two plaintiffs, Howard and Maddox, have changed their behavior as a result of the monument: each visits the rotunda less frequently and enjoys the rotunda less because of the monument's presence. The monument has, therefore, had a direct negative effect on each plaintiff's "use and enjoyment" of the rotunda. Id. at 1105.

The Chief Justice responds that the plaintiffs, nevertheless, do not have standing to bring these cases on the ground that their testimony is not credible. Toward this, the Chief Justice has elicited statements by the plaintiffs showing that they were offended by the Chief Justice's actions before he placed the monument in the State Judicial Building rotunda. For example, plaintiff Glassroth testified in his deposition that he found the use of the Ten Commandments in the Chief Justice's campaign to be "a shameless political use of religion." Plaintiff Maddox, too, thinks that the Chief Justice is "using religion to further his political career"; she also says she was "embarrassed" by the Chief Justice long before he was elected Chief Justice, when, as a state trial judge, he displayed a Ten Commandments plaque in his courtroom. Maddox admitted she was willing to become a plaintiff in these cases before she saw the monument in person. Finally, plaintiff Howard says she is bothered by the Chief Justice's reliance on his religious views in making his decisions as Chief Justice.

While these facts show that the plaintiffs may have been

predisposed to being offended by the monument, they do not go so far as to discredit their testimony that they are, in fact, offended by the monument. Instead, the Chief Justice simply has demonstrated that the plaintiffs have been previously offended by his actions. The Chief Justice suggests that, because of this previous offense, the plaintiffs cannot also have been injured by the monument. This argument is untenable. The plaintiffs' previous offense is consistent with, rather than contradictory to, their offense about the monument. If the court were to find otherwise, it would be mandating that plaintiffs must assert their claims at the first instance of their offense to a defendant's actions or lose their opportunity to complain about later actions; conversely, such holding would also mean that government officials could act without regard to the constitutionality of their actions, so long as they first offended any potential plaintiffs at an earlier time.

The Chief Justice also takes issue with the plaintiffs' testimony that they feel like "outsiders"; he maintains that they are independent thinkers, or are actively involved in their communities, or are thick-skinned. He observes that plaintiff Glassroth serves as a member of the board of directors for the Federal Defenders of the Middle District of Alabama and on the Alabama Sentencing Commission; that plaintiff Maddox is referred to by others and even herself as "the tiny tiger"; and that plaintiff Howard identifies herself as a political independent. The fact that the plaintiffs are strong and accomplished individuals in general, however, is not inconsistent with the fact that they feel like, and are, outsiders within the walls of the Alabama State Judicial Building. If

anything, this fact reflects that the plaintiffs are among the few, if not the only, attorneys who have the commendable courage to sue a judge or justice to seek personal redress under the First Amendment for the harm they have suffered and continue to suffer. Standing is not the sole province of the weak; if anything, as a matter of practice if not the law, it is that of the strong, for only they will rise to assert it.

The plaintiffs have all testified that they have been injured as a direct result of their contact with the monument, and the court finds their testimony credible in full. The plaintiffs have standing to pursue their Establishment Clause claim.[1]

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[1] Admittedly, in Alabama Freethought Ass'n v. Moore, 893 F. Supp. 1522 (N.D. Ala. 1995), mentioned earlier, the district court found that the plaintiffs lacked standing. In that case, the court found that the plaintiffs did not provide "allegation[s] nor evidence that plaintiffs [were] in imminent threat of being" subjected to the challenged display, id. at 1544, nor did the plaintiffs provide evidence that their regular course of business required their presence in Judge Moore's courtroom. Id. at 1528-29. Indeed, only one plaintiff in that case was ever required to be in Judge Moore's courtroom, and, then, only for a few moments. Id. at 1527. The plaintiffs tried to assert standing on the fact that they were "subject to" the possibility of coming into contact with the challenged display, either as potential litigants or jurors in Judge Moore's courtroom. Id. at 1544. The case before this court is patently distinguishable, as each plaintiff testified that their professional duties did require and will continue to require their presence in the Alabama State Judicial Building. Therefore, the district court's finding in Alabama Freethought Association, that the plaintiffs lacked standing, has no bearing on the issue of the plaintiffs' standing in this case.

B.

With the standing issue resolved, the court moves to the heart of its Establishment Clause inquiry. For a practice to survive an Establishment Clause challenge, it "must have a secular legislative purpose, ... its principal or primary effect must be one that neither advances nor inhibits religion, ... [and it] must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971) (citations omitted). The plaintiffs contend that Chief Justice Moore's display of the monument fails this test, frequently called the Lemon test, in two ways: (1) his fundamental, if not sole, purpose in displaying the monument was non-secular; and (2) the monument's primary effect advances religion.

1.

That Chief Justice Moore's purpose in displaying the monument was non-secular is self-evident. First, it is self-evident from his own words. At the monument's unveiling ceremony, the Chief Justice explained that the monument "serves to remind ... that in order to establish justice we must invoke 'the favor and guidance of almighty God.'" He made clear that, in order to restore this moral foundation of law, "we must first recognize the source from which all morality springs ... [by] recogniz[ing] the sovereignty of God." Thus, he made clear that, while the monument depicted the "moral foundation of law," it was ultimately a monument to the giver of this foundation, the Judeo-Christian God. He saw the placement of

the monument in the Judicial Building rotunda as not only "the beginning of the restoration of the moral foundation of law to our people," but, more fundamentally, as "a return to the knowledge of God in our land."

In his trial testimony before this court, the Chief Justice gave more structure to his understanding of the relationship of God and the state, and the role the monument was intended to play in conveying that message. He explained that the Judeo-Christian God reigned over both the church and the state in this country, and that both owed allegiance to that God. In other words, the Chief Justice described essentially a vertical or standing triangle, with God at the top as the sovereign head, and with the state and the church, side-by-side, forming the base under God.

The Chief Justice also explained at trial how his design and placement of the monument reflected this understanding of the relationship of God and the state. His design concerns were religious rather than secular in that the quotations were placed on the sides of the monument instead of on its top because, in keeping with his religious belief, these statements were the words of man and thus could not be placed on the same plane with the Word of God. Similarly, he rejected the addition, along side the Ten Commandments monument, of a monument containing Rev. Dr. Martin Luther King, Jr.'s "I Have a Dream" speech, not for secular reasons but because the speech was not "the revealed law of God."

The Ten Commandments monument, as the Chief

Justice made clear both at the unveiling ceremony and at trial, is a granite reminder to Alabama judges and justices and all other state citizens of the ultimate sovereignty of the Judeo-Christian God over both the state and the church, and of how all men and women should, therefore, look to God as the ultimate source of the moral foundation of all the laws of this country; for, it was God, and not man or the state, that gave us the Ten Commandments.

Chief Justice Moore's non-secular purpose is also evident from the monument itself. To be sure, "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." Stone v. Graham, 449 U.S. 39, 41, 101 S. Ct. 192, 194 (1980) (per curiam). But, as the evidence in this case more than adequately reflected, the Ten Commandments have a secular aspect as well. Experts on both sides testified that the Ten Commandments were a foundation of American law, that America's founders looked to and relied on the Ten Commandments as a source of absolute moral standards. The second tablet, of course, is entirely secular--from "Thou shalt not kill" to "Thou shalt not covet"--but the first tablet also has secular aspects. As the Chief Justice pointed out in his speech unveiling the monument, Samuel Adams gave a speech, the day before the signing of the Declaration of Independence, referring to the King as a false idol, alluding to the Commandment that "Thou shalt have no other Gods before me."

While the secular aspect of the Ten Commandments can

be emphasized, this monument, however, leaves no room for ambiguity about its religious appearance. Its sloping top and the religious air of the tablets unequivocally call to mind an open Bible resting on a podium. While the quotations on the monument's sides are non-Biblical, they still speak solely to non-secular matters, that is, to the importance of religion and the sovereignty of God in our society; these non-Biblical quotations are physically below and not on the same plane with the Biblical one. Further, there is the ineffable but still overwhelming sacred aura of the monument. As the court observed earlier, it was not surprising to learn that visitors and court employees found the monument to be an appropriate, and even compelling, place for prayer. The only way to miss the religious or non-secular appearance of the monument would be to walk through the Alabama State Judicial Building with one's eyes closed.

The monument in the Alabama State Judicial Building is, therefore, dramatically different from other Ten Commandments displays in other government buildings and on other government land across the country. It is different from such displays as: (1) Moses, among other historical lawgivers, holding two blank tablets on the East Portico of the United States Supreme Court Building; (2) a carving of two tablets with the numbers I through X on the entrance door to the United States Supreme Court's courtroom; (3) a pylon in front of the E. Barrett Prettyman Building in Washington D.C. with (among other things) two tablets engraved with Hebrew writing; (4) two blank tablets at the feet of the Spirit of Justice statue in the United States Justice Department Building; and (5) a mural in

the Pennsylvania Supreme Court courtroom with Moses carving the Ten Commandments and a full version of the text of the Ten Commandments. In each of these displays, the Ten Commandments are situated in a secular context and the secular nature of the display is apparent and dominant.

In a mural on the United States Supreme Court building, the Ten Commandments are displayed as two blank tablets, held by Moses sitting amongst many other historical lawgivers. The Commandments displayed on the door to the Supreme Court's courtroom are so small as to be almost unnoticeable, are among many other decorations such as a lion's head and a head of wheat, and are simply two tablets containing the Roman numerals I through X. The Ten Commandments on the pylon in front of the E. Barrett Prettyman building are two small tablets, with part of the Ten Commandments in Hebrew, as part of a larger display representing freedom of religion, freedom of the press, and freedom of speech. On a second side of the pylon are a similar series of carvings representing criminal law and the protections of due process, and on the third side are non-religious excerpts from the Declaration of Independence, the preamble to the Constitution, and the Fifth Amendment. Just as those held by Moses on the United States Supreme Court building, the tablets at the feet of the Spirit of Justice statue in the Department of Justice building, a building closed to the public since at least the late 1970's, are blank. Similarl to those on the door to the Supreme Court's courtroom, they are so dominated by their surroundings (in this case, the statue) as to draw little attention. Finally, the mural in the Pennsylvania Supreme Court courtroom is one of many similar murals in that

room, including murals featuring William Blackstone and the Code of Justinian.

The Chief Justice's monument is even different from those Ten Commandments displays found by other courts to violate the Establishment Clause in that the non-secular purpose and appearance of the Chief Justice's monument is much more apparent. For example, in Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 768-69 (7th Cir. 2001), cert. denied, 534 U.S. 1162, 122 S. Ct. 1173 (2002), the Seventh Circuit Court of Appeals addressed a monument with the Ten Commandments and Bill of Rights placed side-by-side, designed "to honor our history by reminding society of its core values and to honor our legal tradition since several of our secular laws are parallel to the Ten Commandments." Id. at 771. Similarly, in Books v. City of Elkhart, 235 F.3d 292, 296 (7th Cir. 2000), cert. denied, 532 U.S. 1058, 121 S. Ct. 2209 (2001), the Seventh Circuit confronted a monument with a large version of the Ten Commandments, placed by the Fraternal Order of Eagles, seeking to provide troubled youths with a non-sectarian and non-coercive code of conduct. Id. at 294. This case is not as difficult as those in which the evidence reflected that the Ten Commandments display at issue had an arguably secular, historical purpose, for the evidence here does not even begin to support that conclusion, nor does the evidence support the conclusion that the Ten Commandments were displayed as sort of a secular moral code. The Chief Justice's words unequivocally belie such purposes.

This case, indeed, is unique in that, under not only the

Lemon test, but also under the test proposed by some of Lemon's most vocal critics on the United States Supreme Court, the Chief Justice's placement of the Ten Commandments monument in the Alabama State Judicial Building would be unconstitutional. In County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 109 S. Ct. 3086 (1989), Justice Kennedy, writing for himself and Justices Rehnquist and Scalia, two of Lemon's strongest critics, suggested that religious endorsement was not enough to establish an Establishment Clause violation, that there must be more, such as "proselytization" or "coercion." Id. at 660, 109 S. Ct. at 3136-37 (Kennedy, J., concurring in part and dissenting in part). As he explained, "coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition of accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is per se suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." Id. at 661, 109 S. Ct. at 3137.

Justice Kennedy's proselytization test is met here. Both in appearance and in stated purpose, the Chief Justice's Ten Commandments monument is an "extreme case"; it is nothing less than "an obtrusive year-round religious display" installed in the Alabama State Judicial Building in order to "place the government's weight behind an obvious effort to proselytize on behalf of a particular religion," the Chief Justice's religion. Id.

2.

That the Ten Commandments monument's primary effect advances religion is also self-evident. To satisfy the second prong of the Lemon test, the challenged practice must have a "principal or primary effect ... that neither advances nor inhibits religion." Lemon, 403 U.S. at 612, 91 S. Ct. at 2111. In evaluating practices under this prong, the United States Supreme Court has "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592, 109 S. Ct. 3086, 3100 (1989). When attempting to define "endorsement," the Court likened it to "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred," id. at 593, 109 S. Ct. at 3101 (citation omitted) (emphasis in original), or to "promot[ing] one religion or religious theory against another or even against the militant opposite." Id. (citation omitted).

This endorsement test is objective in nature. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 693-94, 104 S. Ct. 1355, 1370 (1984) (O'Connor, J., concurring) ("[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is ... in large part a legal question to be answered on the basis of judicial interpretation of social facts.") The court's inquiry in this case,

therefore, turns on whether a reasonable observer would perceive the practice in question as endorsing religion. See Allegheny, 492 U.S. at 630, 109 S. Ct. at 3121 (O'Connor, J., concurring).

The parties disagree as to what evidence should be considered by the court in applying the "reasonable observer" standard. The proper application of the endorsement test, and, specifically, what information a "reasonable observer" would possess, was addressed by Justices O'Connor, Stevens, and Scalia in Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 115 S. Ct. 2440 (1995). Justice Stevens would broadly extend the reasonable observer concept "to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement." Id. at 800 n.5, 115 S. Ct. at 2466 n.5 (Stevens, J., dissenting). Justice O'Connor's reasonable observer, on the other hand, would be more informed, "similar to the 'reasonable person' in tort law," and "must be deemed aware of the history and context of the community and forum in which the religious display appears." Id. at 779-80, 115 S. Ct. at 2455 (O'Connor, J., concurring in part and concurring in the judgment). Finally, Justice Scalia refused to adopt either version of the endorsement test, instead finding it "significant that [in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S. Ct. 2141 (1993)] we referred only to what would be thought by 'the community'--not by outsiders or individual members of the community uninformed about the school's practice." 515 U.S. at 765, 115 S. Ct. at 2448 (Scalia, J.). Justice Scalia further noted that some uninformed

community members "might leap to the erroneous conclusion of state endorsement. But ... erroneous conclusions do not count." Id. (emphasis in original).

Given Justice Scalia's understanding of Lamb's Chapel, it is evident that the Court generally has considered community perceptions of the challenged practice to be determinative, rather than the perceptions of "some members" or other general observers. Thus, it appears that Justice O'Connor's view of the reasonable observer, who "must be deemed aware of the history and context of the community and forum in which the religious display appears," id. at 780, 115 S. Ct. at 2455, most closely comports with prior Court precedent. As such, the court will consider whether the monument has the impermissible effect of endorsing religion with respect to a "reasonable observer" aware of the history and context of the community and forum in which the monument appears.

For purposes of this case, the import of that awareness is clear. A reasonable observer would know that the Chief Justice ran as the "Ten Commandments Judge" during his campaign for Chief Justice, that the Chief Justice placed the monument in the Judicial Building rotunda to fulfill his campaign promise "to restore the moral foundation of law," and that, as the Chief Justice repeatedly emphasized at the unveiling, the monument "serves to remind ... that in order to establish justice we must invoke 'the favor and guidance of almighty God.'" That reasonable observer would also know that the Judicial Building rotunda is not a public forum, and that other groups may not place their own displays in the rotunda.

On the other hand, the court does not impute to a reasonable observer any knowledge of the Chief Justice's relationship with Coral Ridge Ministries or the numerous speeches, television and radio appearances he has given over the past two years; though, given that the Chief Justice is a state official, that the monument is in a state building, and that the Chief Justice's relationship with Coral Ridge has been open and extensive, a reasonable argument could be advanced that these should be imputed as well. Even with this limited knowledge, however, the court concludes that a reasonable observer would view the monument's primary effect as an endorsement of religion.

As discussed above, the monument's primary feature is the Ten Commandments, an "undeniably ... sacred text," Stone v. Graham, 449 U.S. 39, 41, 101 S. Ct. 192, 194 (1980), carved as tablets into the top of the monument. See Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 772 (7th Cir. 2001) (recognizing additional religious signficance when the Commandments are presented as tablet-shaped blocks), cert. denied, 534 U.S. 1162, 122 S. Ct. 1173 (2002). The monument's sloping top and the religious air of tablets unequivocally call to mind an open Bible resting on a podium. While the quotations on the monument's sides are non-Biblical, the fact that they have been edited so as to emphasize the importance of religion and the sovereignty of God in our society fails to diminish, and even amplifies, the ineffable but still overwhelming holy aura of the monument. As the Chief Justice himself stated at the monument's unveiling ceremony, these quotations were not included to serve as "history, [or] historical documents. All history supports the acknowledgment of God.

You'll find no documents surrounding the Ten Commandments because they stand alone as an acknowledgment of that God that's contained in our pledge, contained in our motto, and contained in our oath." No part of the monument itself, nor sign, nor other decoration in the rotunda, in any way emphasizes the potentially secular nature of the Commandments. See, e.g., Allegheny, 492 U.S. at 598, 109 S. Ct. at 3103 (explaining that the effect of a creche, which is capable of communicating a religious message, turns on its setting). Thus, a reasonable observer, viewing this monument installed by the "Ten Commandments Judge" as a whole, would focus on the Ten Commandments, would find nothing on the monument to de-emphasize its religious nature, and would feel as though the State of Alabama is advancing or endorsing, favoring or preferring, Christianity.

The court also finds nothing in "the history of the monument's placement and maintenance as well as the physical characteristics of the monument and of the surrounding area," Books v. City of Elkhart, 235 F.3d 292, 294 (7th Cir. 2000), that would change the court's view that the monument endorses religion. See also Allegheny, 492 U.S. at 578-87, 109 S. Ct. 3093-99 (discussing the challenged monument, its placement, and the surrounding area). In this case, the Chief Justice installed the monument to fulfill a campaign promise to "restore the moral foundation of law." The monument stands alone in the rotunda, in front of a large picture window with a waterfall in the background, with no other objects to provide a different "focal point" of a viewer's attention. See id. at 598, 109 S. Ct. at 3103 (distinguishing the Court's opinion in Allegheny from

its holding in Lynch because the Lynch display "composed a series of figures and objects, each group of which had its own focal point"). While the rotunda does contain two other plaques, these plaques are much smaller and are over seventy feet away with no sign to indicate that they are connected to or related to the monument in any way. Finally, the rotunda is not an open forum; no other group may install a different monument or plaque in the rotunda without the Chief Justice's permission. Taken together, this history and the physical characteristics of the monument and its surrounding area do nothing to mitigate the monument's effect of endorsing religion, of showing that Christianity is the "favored or preferred" religion of the state of Alabama.

The Ten Commandments monument, viewed alone or in the context of its history, placement, and location, has the primary effect of endorsing religion. As such, the monument violates the second prong of the Lemon test, and it therefore violates the Establishment Clause.[2]

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[2] While not argued by the plaintiffs, the court is concerned that Chief Justice Moore's involvement with Coral Ridge Ministries, a Christian media outlet, violates the third, entanglement prong of the Lemon test. Aside from its being the only media outlet to record the night-time placement of the monument in the Alabama State Judicial Building, Coral Ridge has used the Chief Justice's name and his installation of the Ten Commandments monument to raise funds for not only his defense but also its own evangelical purposes. For example, Coral Ridge uses a picture of the monument to raise money for the Chief Justice's legal defense and, at the same time, to raise money for its own work. A fund-raising letter from Coral Ridge President Dr. James Kennedy included a donor-response form which read, in part, "I want to help provide for Justice Moore's and the Ten Commandments' legal defense. Also, use my gift to continue sharing the life-transforming Gospel,

through new editions of The Coral Ridge Hour and all the ongoing work of Coral Ridge Ministries." In another fund-raising letter, Kennedy wrote, "Please pray and send your most generous possible gift to help us aid in the judge's defense and continue all of the outreaches of the ministry together." Coral Ridge has also used the Chief Justice and the monument as a subject of many of its television and radio programs and has, a number of times, highlighted the Chief Justice's lawsuit in its newsletter "Impact." Coral Ridge even uses the Chief Justice to raise funds on its website: "If you would like to help with the $200,000 Ten Commandments Defense fund and also enable Dr. Kennedy to continue the work of this ministry, send your gift." Additionally, while the Chief Justice is a state official, sued for his placement of a monument in a state building, the State of Alabama is not paying Chief Justice Moore's legal expenses; these expenses are instead being paid by a private source, Coral Ridge.

In a real sense, therefore, the installation of the monument can be viewed as a joint venture between the Chief Justice and Coral Ridge, as both parties have a direct interest in its continued presence in the rotunda. A credible argument could be made that this type of entanglement is specifically the type of "evil[] against which [the] Clause protects ... 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772, 93 S. Ct. 2955, 2965 (1973) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668, 90 S. Ct. 1409, 1411 (1970)).

Admittedly, the Chief Justice denies an active relationship between himself and Coral Ridge. He contends that he has not been involved in the ministry's efforts, through the use of his name and the publicity surrounding the monument, to raise funds for his legal defense in conjunction with efforts to raise funds for its religious projects. But the law recognizes that one cannot escape responsibility for the acts of others, taken on one's behalf, through deliberate ignorance. Jim Walter Res., Inc. v. Allen, 995 F.2d 1027, 1029 (11th Cir. 1993) (holding that deliberate ignorance to the kind of work employee performed would not excuse management from liability for injury employee incurred on the job); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1530 (M.D. Fla. 1991) (finding that employer could not escape liability for hostile work environment by "elect[ing] to bury its head in the sand rather than learn more about the conditions to which female employees ... were subjected"). In a very real way, then, it could be argued

C.

Chief Justice Moore contends that the plaintiffs err in their application of the Lemon test.

1.

The Chief Justice contends that the United States Supreme Court's historical analysis in Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983), rather than its test from Lemon, should be applied to determine the outcome of this case. In Marsh, the Court concentrated on the very specific nature of the facts in that case to conclude that the Nebraska legislature's practice of opening each session with a non-sectarian prayer did not violate the Establishment Clause. See Marsh, 463 U.S. at 786, 103 S. Ct. at 3333. Specifically, the Court focused on the fact that

> "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."

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that Coral Ridge's religious activity is being sponsored and financially supported by the Chief Justice's installation of the monument as a government official.

Id. The Court also noted that the Continental Congress itself adopted the procedure of opening its sessions with a prayer, id. at 787, 103 S. Ct. at 3333-34, and found that "Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." Id. at 788, 103 S. Ct. at 3334. This "unique history" of legislative prayer was of central importance to the Court in making its decision. Id. at 791, 103 S. Ct. at 3335.

A comparison of Lemon and Marsh, however, reveals that this court need not choose between two competing and mutually-exclusive tests. Thus, the court cannot accept the Chief Justice's argument that the historical analysis from Marsh has replaced the Lemon test in the Supreme Court's Establishment Clause jurisprudence. First, while the Lemon test has been criticized by a number of Supreme Court Justices, Lemon has not been overruled, see Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7, 113 S. Ct. 2141, 2148 n.7 (1993) (noting that Lemon, despite heavy criticism, is still good law), and a clarified (endorsement) version of the Lemon test is still regularly applied by the Court. See, e.g., Zelman v. Simmons-Harris, ___ U.S. ___, ___, 122 S. Ct. 2460, 2476 (2002) (O'Connor, J., concurring) ("A central tool in our analysis of cases in this area has been the Lemon test. ... The test today is basically the same as that set forth ... over 40 years ago."); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314, 120 S. Ct. 2266, 2282 (2000) ("Lemon ... 'guides

the general nature of our inquiry in this area.'") (citation omitted). The Eleventh Circuit, too, has continued to apply the Lemon test despite this criticism. Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1468 (11th Cir. 1997).

Second, Marsh can be viewed as "an exception to the Lemon test only for such historical practice[s]" as those comparable to legislative prayer. Jager v. Douglas County Sch. Dist., 862 F.2d 824, 829 n.9 (11th Cir. 1989), cert. denied, 490 U.S. 1090, 109 S. Ct. 2431 (1989); see also Marsh, 463 U.S. at 796, 103 S. Ct. at 3338 (Brennan, J., dissenting) (calling Marsh a limited exception to Lemon); but see Allegheny, 492 U.S. at 669-70, 109 S. Ct. at 3142 (Kennedy, J., concurring in part and dissenting in part) (rejecting this view of Marsh). In other words, a practice that fails any one prong of the Lemon test may still be found constitutional under the Marsh exception to the Lemon test. The court therefore need not, as the Chief Justice would have it, choose which of the two cases to apply. Rather, having already found the Chief Justice's installation of the monument to fail the first two prongs of the Lemon test, the court now turns to the question of whether the monument nevertheless can be found constitutional under Marsh.

As discussed above, the United States Supreme Court in Marsh, rather than applying the Lemon test, concentrated on the very specific nature of the facts in that case to conclude that the Nebraska legislature's practice of opening each session with a non-sectarian prayer did not violate the Establishment Clause. Marsh, 463 U.S. at 786, 103 S. Ct. at 3333; see also County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573,

603, 109 S. Ct. 3086, 3106 (1989) ("Marsh plainly does not stand for the sweeping proposition ... that all accepted practices 200 years old and their equivalents are constitutional today."); Edwards v. Aguillard, 482 U.S. 578, 583 n.4, 107 S. Ct. 2573, 2577 n.4 (1987) (noting that Lemon had been applied in all cases, save Marsh, since its adoption); Wallace v. Jaffree, 472 U.S. 38, 63 n.4, 105 S. Ct. 2479, 2493 n.4 (1985) (Powell, J., concurring) (stating that the Marsh holding was "based upon the historical acceptance of the practice that had become 'part of the fabric of our society.'") (citation omitted). The Chief Justice argues that the case at hand has similarly unique facts and should therefore be found constitutional under this exception to the Lemon test.

The Chief Justice contends that, under Marsh, the monument is constitutional because, as he has written in his briefs to the court, "judges throughout our nation's history have acknowledged the moral foundation of law and, indeed, have depended upon it in reaching their decisions." He points to an uninterrupted history, from as early as 1819 to today, in which courts "interacted with, relied upon, or otherwise discussed the moral foundation of the law [in their decisions]." As such, the Chief Justice contends, his reference to "God and to God's law on the monument do not render it unconstitutional." The Chief Justice also argues that the acknowledgment of God made by this monument is no different from the acknowledgments of God appearing on United States currency, in the United States motto, and at the opening of court sessions. Basically, the Chief Justice argues that the monument's acknowledgment of God, like the legislative prayer upheld in Marsh, is part of our

nation's history.

Additionally, the Chief Justice has presented evidence of numerous displays of the Ten Commandments in judicial buildings and other government buildings in Washington, D.C. The Chief Justice argues that the existence of these Ten Commandments displays demonstrate a history of such displays which validate the constitutionality of his own display under Marsh. The most significant of these displays, discussed previously, are: (1) Moses, among other historical lawgivers, holding two tablets on the East Portico of the United States Supreme Court Building; (2) a carving of two tablets with the numbers I through X on the entrance door to the United States Supreme Court's courtroom; (3) a pylon in front of the E. Barrett Prettyman Building in Washington D.C. with (among other things) two tablets carved with Hebrew writing; (4) two blank tablets at the feet of the Spirit of Justice statue in the United States Justice Department Building; and (5) a mural in the Pennsylvania Supreme Court courtroom with Moses carving the Ten Commandments and a full version of the text of the Ten Commandments.

The Chief Justice's first argument, that the monument is constitutional under Marsh because of the historical validation provided by judicial acknowledgment in court opinions of the moral foundation of law, and other governmental acknowledgments of God, is flawed. Even assuming the Chief Justice's contentions are true, that judges in their opinions throughout American history have recognized the moral foundation of law, it does not follow that this monument should

be considered simply as part of that long history of recognition; nor does it follow that this monument is simply one in a long line of governmental acknowledgments of God. First, as discussed previously, the Chief Justice's understanding of the moral foundation of our laws flows from his beliefs that the Judeo-Christian God is the source of the church, the state, and the separation of the two, and, as a matter of not only Biblical text but American law, reigns over both. The Chief Justice has not shown that other judges have recognized this same understanding of the sovereignty of the Judeo-Christian God, and, given the Chief Justice's unique views, the court cannot assume that they did. Second, there is a significant difference between "an obtrusive year-round religious display" installed in the Alabama State Judicial Building in order to "place the government's weight behind an obvious effort to proselytize on behalf of a particular religion," County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 661, 109 S. Ct. 3086, 3137 (1989) (Kennedy, J., concurring in part and dissenting in part), and the discussion of the moral foundation of our laws in a court's opinion, or the ceremonial recognition of God on money or at the opening of court.

Challenges under the Establishment Clause have often turned on subtle but significant differences. A creche standing alone is constitutionally different from a creche incorporated into a larger holiday display, compare id. at 578-79, 109 S. Ct. at 3093 (holding unconstitutional a creche standing alone) with Lynch v. Donnelly, 465 U.S. 668, 687, 104 S. Ct. 1355, 1366 (1984) (finding constitutional a creche incorporated as part of a larger holiday display), and legislative prayer is significantly

different from prayer at a high-school graduation, compare Marsh, 463 U.S. at 795, 103 S. Ct. at 3338 (holding non-sectarian legislative prayer constitutional) with Lee v. Weisman, 505 U.S. 577, 599, 112 S. Ct. 2649, 2661 (1992) (finding prayers at high school graduation to be unconstitutional). Similarly, "ceremonial deisms," such as legislative prayers or opening Court sessions with "God save the United States and this honorable Court," are different from public acknowledgments of a sectarian God. Compare Allegheny, 492 U.S. 630, 109 S. Ct. at 3120-21 (O'Connor, J. concurring) (noting that legislative prayer solemnizes public occasions and expresses hope in the future) with id. at 603, 109 S. Ct. at 3106 (finding an obvious difference between creche displays and references to God in the National Motto and the Pledge of Allegiance). As such, neither an unbroken history of judicial recognition of the moral foundation of law, nor ceremonial acknowledgments of a non-sectarian God, both of which are very different from the Chief Justice's permanent, prominent granite monument to the sovereignty of God, is enough to find the Chief Justice's actions constitutional under the Marsh exception.

Additionally, while the Chief Justice has brought other displays of the Ten Commandments to the court's attention, he has not demonstrated that any of the "unique" circumstances from Marsh exist in this case. First, the Chief Justice has not shown that members of the Continental Congress displayed the Ten Commandments in their chambers, nor that they directly approved of its public display by the government. Second, public, governmental displays of the Ten Commandments,

installed with the purpose of proselytization and having a religious effect, are not "deeply embedded in the history and tradition of this country," Marsh, 463 U.S. at 786, 103 S. Ct. at 3333; indeed, most date from the twentieth century. Thus, the Chief Justice has failed to show that similar displays are common or even generally accepted in this country.

Finally, even if, for the sake of argument, history could be read to support the Chief Justice's contention that Ten Commandments displays in government buildings have been a sufficiently historical part of the fabric of our society, this tradition would fall far short of providing a constitutional basis for the Chief Justice's Ten Commandments monument. No other Ten Commandments display presents such an extreme case of religious acknowledgment, endorsement, and even proselytization. In other words, if there is a Ten Commandments display tradition in this country, it is definitely not the tradition embodied by the Chief Justice's monument.

Because no historical background, comparable to that found in Marsh, exists to validate the constitutionality of Chief Justice Moore's Ten Commandments monument, the court finds that the monument is not constitutional under the Marsh exception to the Lemon test.

2.

Chief Justice Moore faults not only the plaintiffs but the United States Supreme Court for failing to understand the historical relationship between God and the state, a relationship he believes to be embodied by the Establishment Clause and

which would allow the presence of his Ten Commandments monument in the Alabama State Judicial Building.

As mentioned above, at trial the Chief Justice explained at length his understanding of the relationship between God and the state. In the Chief Justice's understanding, the Judeo-Christian God is sovereign over both the church and the state in this country, and both owe allegiance to that God. In descriptive terms, God, as the sovereign head, is at the top of a hierarchical vertical triangle; under God are the state and the church, standing next to one another and forming the base of the triangle. The Chief Justice maintains that this understanding of the relationship between God and the state is dictated not only by Biblical text but by the First Amendment itself.

As the Chief Justice explained at trial, relying in large measure on his dissenting opinion in Yates v. El Bethel Primitive Baptist Church, ___ So. 2d ___, 2002 WL 31270278 (Ala. 2002) (Moore, C.J., dissenting), the separation of church and state is "most vividly illustrated by the Old Testament nation of Israel, where institutional lines were drawn so clearly that the chief of state, the king, could not even come from the same family or tribe as the chief ecclesiastical officer, the high priest." Id. at *18. The Chief Justice gave the examples of: "King Uzziah, son of Amaziah, [who] was stricken with leprosy when he presumed upon the role of the priests in burning incense unto the Lord," and "Saul, the first king of Israel, [who] trespassed upon the jurisdiction of the church by making a burnt offering instead of waiting for Samuel, the priest, to perform his

duty." Id. (citing II Chronicles 26:16-21 (King James); I Samuel 13:13-14 (King James)). Thus, the Bible dictates the Chief Justice's understanding of the relationship between God and the state because, "While both the priest and the king were under the law of God, the role of civil government was separated from the worship of God." Id. Jesus, too, according to the Chief Justice, explicitly recognized this separation when he said "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." Id. (citing Matthew 22:21 (King James)).

The Chief Justice also believes that his specific understanding of the relationship between God and the state is embodied by the First Amendment. The Chief Justice quotes Thomas Jefferson's "Bill For Establishing Religious Freedom," "that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain," El Bethel, ___ So. 2d ___, 2002 WL 31270278, *17 (emphasis added by the Chief Justice), for the proposition that "even Thomas Jefferson recognized that a separation between church and state existed because 'Almighty God' was sovereign over both institutions." Id. The Chief Justice also quotes James Madison's "Memorial and Remonstrance": "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe ..." Id. at *22 (quoting II The Writings of James Madison 184-85 (Gaillard Hunt, ed., G.P. Putnam's Sons 1901). This

language leads to the Chief Justice's conclusion that "Madison explicitly recognized that maintaining a 'separation' in no way meant to separate from civil government a belief in the sovereignty of God. Indeed, the very concept of separation mandates a recognition of a sovereign God." Id. at *21. The Chief Justice uses these examples from Jefferson and Madison, as well as earlier examples in English history, to support his belief "that the recognition of the sovereignty of God is the very source of the principle of the separation of church and state." Id. at *22.

Indeed, in the Chief Justice's view, it is the Judeo-Christian God, through the Biblically dictated separation of church and state, who gives Americans the freedom of conscience to believe in whatever faith they choose. Americans are free to worship other Gods only because the Judeo-Christian God, and the Judeo-Christian God alone, allows for freedom of conscience. Because all other Gods, in the Chief Justice's view, do not allow for freedom of conscience, we, as Americans, would not have such freedom if another God were placed over the church and state under our governmental framework.[1]

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[1] Some might disagree, even strongly, with the Chief Justice's view that other, non-Judeo-Christian, Gods are not tolerant, and that the Judeo-Christian God, at least as the Judeo-Christian God has been understood over the centuries, is tolerant. As one legal scholar has put it,

> "The Western religions--Christianity, Judaism, and Islam--all rest on principles discouraging or even forbidding coercion in persuading nonbelievers to believe. These principles, to be sure, have often been honored in the breach, although a good deal less often than some may think. Even the Inquisition, to take a prominent example,

The court appreciates that, as a matter of conscience, one may believe that the Judeo-Christian God is sovereign over the state. In fact, the court understands that it is just this type of belief that the Free Exercise clause and the Establishment Clause are meant to protect. Thus, the court stresses that it is not disagreeing with Chief Justice Moore's beliefs regarding the relationship of God and the state. Rather, the court disagrees with the Chief Justice to the extent that it understands him to be saying that, as a matter of American law, the Judeo-Christian God must be recognized as sovereign over the state, or even that the state may adopt that view. This is an opinion about the structure of American government, rather than a matter of religious conscience, that the court feels fully comfortable refusing to accept.

As an initial matter, the court understands how, if it were to adopt the Chief Justice's understanding of the First Amendment as a matter of law, his placement of the monument in the Alabama State Judicial Building would not violate the Establishment Clause. Under the Chief Justice's view, the Judeo-Christian God is the real, and even divine, source for the

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> was never aimed at nonbelievers, only at Christians considered heretics. Most Eastern religions, too, abhor coercion and violence. The fact, for example, that violence has often marked the politics of predominantly Buddhist Sri Lanka does not alter the fundamental nonviolent teaching of that tradition. It means only that the teaching of Buddhism, like similar teachings in other faiths, is sometimes disobeyed by morally frail humans."

Stephen L. Carter, God's Name in Vain 158 (2000).

separation of church and state under the First Amendment. As such, that God, or the belief in that God, cannot be separated from the state, and must not be separated from the state lest we lose our freedom of conscience to worship as we choose; the church as an entity is all that must be separated from the state. Because the Chief Justice's Ten Commandments monument is not a church, and does not coerce people into worshiping God in a certain manner, it does not violate the Establishment Clause as the Chief Justice understands it.

The court, however, rejects the Chief Justice's suggested legal understanding of the relationship between God and the state for a number of reasons. First and foremost, the Chief Justice's belief that American law embraces the sovereignty of God over the state has no support in the text of the First Amendment. The First Amendment simply states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Nowhere does the Constitution or the First Amendment recognize the sovereignty of any God, Judeo-Christian or not, or describe the relationship between God and the state. In fact, this country's founding documents support the idea that it is from the people, and not God, that the state draws its powers. As every American schoolchild knows, the Declaration of Independence states that "governments are instituted among Men, deriving their just powers from the consent of the governed," and the Constitution begins with that immortal phrase, "We the People of the United States, in Order to form a more perfect Union ... do ordain and establish this Constitution for the United States of America." Hence, the Chief Justice has no textual support, in

either the Constitution as a whole or the First Amendment itself, for his legal understanding of the relationship between God and the state, and the court must therefore reject that understanding. Second, the Chief Justice's understanding of this relationship has no support in Supreme Court law. No Supreme Court decision and, the court believes, no Supreme Court justice, has suggested that the First Amendment itself actually incorporates the notion of a Judeo-Christian God as the sovereign head of this nation. The First Amendment does not elevate one religion above all others, but rather it places all religions on par with one another, and even recognizes the equality of religion and non-religion. See Allegheny, 492 U.S. at 590, 109 S. Ct. at 3099 ("Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'") (quoting Wallace v. Jaffree, 472 U.S. 38, 52, 105 S. Ct. 2479, 2487 (1985)). The Chief Justice's understanding of the First Amendment, however, would discriminate among religions; in fact, it would recognize only Christianity as a "religion" and would relegate Hinduism or Islam, among others, to the lesser status of "faith." Roy S. Moore, Religion in the Public Square, 29 Cumb. L. Rev. 347, 356-57 (1998/1999) ("By leaving religion undefined, the Court has opened the door to the erroneous assumption that, under the Establishment Clause, religion could include Buddhism, Hinduism, Taoism, and whatever might occupy in man's life a place parallel to that filled by God, or even Secular Humanism, which might be defined as man's belief in his own supremacy and sufficiency.").

At trial, the Chief Justice reiterated his belief that only Christianity meets the First Amendment definition of religion, and repeatedly called any other creed a "faith," rather than a religion. As such, the court must also reject the Chief Justice's legal understanding of the First Amendment concept of religion for its lack of support in Supreme Court precedent.

To be sure, some Justices have been more tolerant than others of state "acknowledgment" of various religions; but none has gone so far as to say that the state should or even may acknowledge one religion--that is, Christianity--as the basis on which all other religious faiths are free to worship as they choose. Were the state to do so, it would be engaging in proselytization on behalf of a particular religion, which even those Justices who read the Establishment Clause more narrowly would prohibit. See, e.g., Allegheny, 492 U.S. at 661, 109 S. Ct. at 3137 (Kennedy, J., concurring in part and dissenting in part) (stating that the display of a large Latin cross on the roof of city hall would violate the Establishment Clause because it "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion"). By adopting, as a matter of law, the view that the Judeo-Christian God is the authority behind the First Amendment, the state would also be embracing a particular religion, again in complete violation of the Establishment Clause. See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 401, 113 S. Ct. 2141, 2151 (1993)(Scalia, J., concurring) ("I would hold, simply and clearly, that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not

signify state or local embrace of a particular religious sect."). Even under the most narrow readings of the Establishment Clause, then, while the Chief Justice is free to keep whatever religious beliefs he chooses, the state may not acknowledge the sovereignty of the Judeo-Christian God and attribute to that God our religious freedom.

Third, the court notes that it is hard to separate the Chief Justice's religious beliefs--that he may possess as a matter of conscience--from his legal beliefs--that the court must disagree with--because the Chief Justice's legal understanding of the relationship between God and the state is identical to his religious understanding of that relationship. Indeed, his monument-unveiling speech in the Alabama State Judicial Building would have been as (if not more) appropriate as a Ten Commandments monument-dedication ceremony in a church. One could easily imagine an evangelist preacher giving a sermon about the "truth ... that in order to establish justice, we must invoke 'the favor and guidance of Almighty God,'" and ending with his hope that "this day [may] mark the restoration of the moral foundation of law to our people and the return to the knowledge of God in our land." The Chief Justice's understanding of the relationship between God and the state comes uncomfortably too close to the adoption of "a government of a state by the immediate direction or administration of God." Webster's Third New International Dictionary 2370 (1976), that is, a "theocracy," albeit in the Chief Justice's mind a tolerant one. The court must unequivocally reject the adoption of an approach that could lead to that outcome.

Chief Justice Moore contends that the plaintiffs, and even the United States Supreme Court, have failed to give an appropriate definition of religion; he maintains that an Establishment Clause challenge cannot be resolved with fidelity to the original intent of the framers without adopting a definition of the word "religion" that comports with his understanding of the Establishment Clause.

By the Chief Justice's definition, as stated at trial in reference to his law review article, "religion" means nothing more than "the duties we owe to our Creator and the manner of discharging those duties." Hon. Roy S. Moore, Religion in the Public Square, 29 Cumb. L. Rev. 347, 352 (1998/1999). Relying on this definition, the Chief Justice views the Establishment Clause as simply preventing government from establishing the duties one owes to God and the manner of discharging those duties. This understanding, according to his testimony at trial, "is derived from the Judeo-Christian view of the sovereignty of God, not the Buddhist view of God or the Hindu view of God, or the Taoist view of God, or the secular humanist view of God." Similarly, the Chief Justice has written that,

> "By leaving religion [seemingly] undefined, the [Supreme] Court has opened the door to the erroneous assumption that, under the Establishment Clause, religion could include Buddhism, Hinduism, Taoism, and whatever

> might occupy in man's life a place parallel to that filled by God ... In such a case, God and religion are no longer distinguished in meaning, permitting the First Amendment to be used to exclude the very object it was meant to protect, namely the sovereignty of God over civil government."

Id. at 356-57.[4] In short, his definition of religion would permit the First Amendment to do what he believes it was intended to do: "to protect ... the sovereignty of God over civil government," id., and sovereignty of the Judeo-Christian God only.[5]

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[4] At trial, the Chief Justice testified that he would add the word "seemingly" to this statement from his law review article.

[5] While the court agrees with the Chief Justice that an understanding of "religion" for First Amendment purposes must constitute more than just the acknowledgment of God, it is not inclined to agree with his semantic distinction between "faith" and "religion." In Webster's Third New International Dictionary 816 (1976), "faith" is defined as "1(a): the act or state of wholeheartedly and steadfastly believing in the existence, power, and benevolence of a supreme being ...; belief and trust in and loyalty to God; (b)(1): an act or attitude of intellectual assent to the traditional doctrines of one's religion; orthodox religious belief." In that dictionary, id. at 1918, "religion" is defined as "1: the personal commitment to and serving of God or a god with worshipful devotion, conduct in accord with divine commands esp[ecially] as founded in accepted sacred writings or declared by authoritative teachers, a way of life recognized as incumbent on true believers, and typically the relation of oneself to an organized body of believers."

Under these definitions, Muslims, for example, would call Islam both their "faith" (they believe in the existence of a supreme being) and their

The court, for several reasons, rejects the Chief Justice's invitation to define the term "religion." First and foremost, to adopt the Chief Justice's definition of religion would be to reject explicitly the precedent established by a number of Supreme Court cases, from Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1947), to Zelman v. Simmons-Harris, ___ U.S. ___, 122 S. Ct. 2460 (2002), which would have been decided differently under the Chief Justice's proposed definition. Without cataloguing the many cases that would be resolved differently given the Chief Justice's definition of religion, the court will discuss a number of examples to illustrate this point.

Under the Chief Justice's definition of religion, religious display cases, such as County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 109 S. Ct. 3086 (1989), would be decided differently. In Allegheny, the court found unconstitutional the display of a creche in a government

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"religion" (they have a personal commitment to a God). Under the Chief Justice's understanding and definition of religion, however, Islam is not a "religion," even though it clearly prescribes duties owed to the Creator and the manner of discharging those duties, but it is a "faith." Islam is not a religion under the Chief Justice's views because Muslims do not worship the Judeo-Christian God. While Muslims have a personal commitment to a God, they do not have a personal commitment to the God of the founders; or, using the Chief Justice's definition of religion, Muslims owe duties to their creator and have ways of discharging those duties, but they do not owe the same duties to their creator nor do they have the same manner of discharging those duties as the founders. The court cannot accept a definition of religion that would lead to such a conclusion.

Indeed, the Chief Justice's definition of religion proves, if anything, that it is unwise, and even dangerous, to put forth, as a matter of law, one definition of religion under the First Amendment.

building, id. at 579, 109 S. Ct. at 3093, an outcome that would certainly change if the Establishment Clause prohibited no more than an Establishment of "the duties we owe to our Creator and the manner of discharging those duties." School prayer cases, too, such as Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479 (1985), or Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S. Ct. 2266 (2000), would be resolved differently. In Wallace, the Court found unconstitutional a statute designed to return voluntary prayer to schools, 472 U.S. at 61, 105 S. Ct. at 2492; in Santa Fe, the Court found unconstitutional a policy of student-led prayer before football games, 530 U.S. at 317, 120 S. Ct. at 2283. Again, under the Chief Justice's limited definition of religion, both of these cases would have been decided differently as voluntary prayers cannot establish "the duties we owe to our Creator and the manner of discharging those duties."

By adopting the Chief Justice's definition, then, the court would not only be deciding this case, but would be implicitly overruling a number of Supreme Court cases. This it cannot do: the court is strictly bound by Supreme Court precedent; only that Court has the ability to overturn its previous decisions. See, e.g., Jaffree v. Wallace, 705 F.2d 1526, 1532-33 (11th Cir. 1983) ("Under our form of government and long established law and custom, the Supreme Court is the ultimate authority on the interpretation of our Constitution and laws; its interpretations may not be disregarded. ... If the Supreme Court errs, no other court may correct it."), aff'd, 472 U.S. 38, 105 S. Ct. 2479 (1985); see also Hutto v. Davis, 454 U.S. 370, 375, 102 S. Ct. 703, 706 (1982)

("But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."). Under current Supreme Court precedent, this court simply must decide on which side of the Establishment Clause "barrier," Lemon, 403 U.S. at 614, 91 S. Ct. at 2112, the Chief Justice's installation of the monument falls. It need not, and in fact cannot, accept the Chief Justice's definition of the word "religion" because, by doing so, the court would implicitly overrule a number of Supreme Court decisions.

Second, the court cannot accept the Chief Justice's proposed definition of the word "religion" because it is, simply put, incorrect and religiously offensive. The court cannot accept a definition of religion that does not acknowledge Buddhism or Islam as a religion under the First Amendment, and would in fact directly violate Supreme Court precedent by doing so. See Allegheny, 492 U.S. at 590, 109 S. Ct. at 3099 ("Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'") (quoting Wallace, 472 U.S. at 52, 105 S. Ct. at 2487).

Finally, the plaintiffs have not presented an alternate definition of religion, and the court lacks the expertise to formulate its own definition of religion for First Amendment purposes. Therefore, because the court cannot agree with the

Chief Justice's definition of religion and cannot formulate its own, it must refuse the Chief Justice's invitation to define "religion."

4.

Noting that the Establishment Clause provides that government "shall make no law respecting an establishment of religion," Chief Justice Moore contends that the plaintiffs' challenge to the monument must fail because there is no "law" at issue here. The Chief Justice asserts that, although he put the monument in the Judicial Building as a state actor, his actions did not constitute a "law" or "law-making" for Establishment Clause purposes. The court cannot agree.

The Chief Justice placed the monument in the Judicial Building Rotunda under his authority as administrative head of Alabama's judicial system. Ala. Const. amend. 328, § 6.10 (administration); Ala. Code § 41-10-275 (1975) (leases). His placement of the monument therefore has the force of law. The Chief Justice is the only person with the authority to place the monument or remove it, authority given to him by the laws of Alabama. To say that his actions in placing the monument in the Alabama Judicial Building does not constitute a "law" obfuscates the truth of the situation: the monument was placed in the Judicial Building by a state official, acting in his official state capacity, under powers granted to him by state law. Cf. Lee v. Weisman, 505 U.S. 577, 587, 112 S. Ct. 2649, 2655 (1992) ("A school official, the principal, decided that an invocation and a benediction should be given; this is a choice

attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur."). Indeed, in the Chief Justice's understanding, the Alabama Constitution affirmatively requires him to have put the monument in the rotunda. At trial, he testified: "Well, first I am pleased to present this monument. What pleased me is the fact that it represented my duty under the Constitution of the State of Alabama ... [which] says that I shall take affirmative and appropriate action to correct and alleviate any condition or situation in the administration of justice...."

Because the Chief Justice placed the monument in the Alabama State Judicial Building in his official capacity, under the authority of Alabama law, its placement falls well within the Establishment Clause's purview.

5.

Chief Justice Moore contends that the plaintiffs, in their application of Lemon, fail to draw a distinction between motive and purpose, thereby conflating his permissible "purpose" for installing the monument with his irrelevant "motive" for its installation. An example may help to elucidate this difference: if a legislator voted to support a bill to build a highway through his district, his purpose would be simply to build a highway, no matter what his underlying motive (to create jobs, please voters, etc.) may have been. The Chief Justice argues that only evidence of his purpose in erecting the monument may be considered by the court. While the court finds that the Chief Justice's distinction between "motive" and "purpose" has

potential merit, that distinction is not determinative in this case.

The Supreme Court, in Board of Education v. Mergens, 496 U.S. 226, 249, 110 S. Ct. 2356, 2371 (1990) (holding the Equal Access Act requires school to allow a religious group equal access to school facilities and that the Act does not violate the Establishment Clause as so construed), provides some support for the distinction between purpose and motive: "Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted [it]." (Emphasis in original). Justice O'Connor's concurrence in Wallace v. Jaffree, 472 U.S. 38, 74-75, 105 S. Ct. 2479, 2499 (1985) (finding statutes providing for voluntary school prayer unconstitutional), also instructs on the scope of the court's inquiry into the Chief Justice's intent. In Wallace, Justice O'Connor said the purpose inquiry should be deferential and limited, and, if a secular purpose behind a statute is plausible, the court should look only at the statute on its face, its official legislative history, or its interpretation by a responsible administrative agency. Id.

While the court agrees with the Chief Justice that there is a difference between motive and purpose, it finds that difference to be less pronounced (and therefore less identifiable) when a single individual, as opposed to a group of individuals such as an entire legislature, is responsible for the challenged practice. And the difference is even more pronounced when the challenged practice is not a written statute.

In making a distinction between purpose and motive, the Mergens Court distinguished between the professed purpose of a statute, as embodied by its text, and the motivations of individual legislators in drafting or voting for the statute. Mergens, 496 U.S. at 249, 110 S. Ct. at 2371. In the present case, the "law" in question is really an action taken by Justice Moore. In determining the purpose of that action, the court must consider the reasoning of the person who took it. Unlike a statute, the purpose of which can be analyzed with reference to available written materials and without reference to the individual motivations of legislators, the purpose of Justice Moore's action can only be understood with respect to his own reasoning in taking it. Therefore, the distinction between motive and purpose in this case is much more of an artificial construct than it is in cases involving challenges to written laws.

For example, the court cannot fully accept the Chief Justice's argument that his speech unveiling the monument shows his "purpose" (because he was wearing his Chief Justice "hat" during that speech), while an interview he gave just over one month later with Dr. James Kennedy of Coral Ridge Ministries shows his "intent" (because he was wearing his individual "hat" during that interview).[6] Surely, the Chief Justice (and, in particular, when he is acting as Chief Justice Moore, the legal and administrative head of the State of Alabama) does not think that speeches are not a part of his duties as a Justice. To accept such a distinction would raise

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[6] The court has an especially difficult time with this distinction here because of the extent to which the Chief Justice's religious views control his understanding of the structure of government. See infra, part II(C)(3).

many difficult line-drawing issues as to when, exactly, a government actor is speaking in his individual capacity and when he is speaking in his professional capacity. For example, when the Chief Justice helped to install the monument on the night of July 31, 2001, was he doing so in his individual capacity or his capacity as Chief Justice? This distinction is complicated by the fact that the Chief Justice suggested at trial that Moore, the individual, gave the monument to Moore, the Chief Justice. The Chief Justice has proposed no objective criteria to help the court differentiate between the two.

The court, however, need not and therefore will not decide the ramifications of the difference between "motive" and "purpose" in this case. It is sufficient for present purposes to recognize that a court looking at "purpose" in an Establishment Clause case may look beyond the stated legislative purpose. As the Supreme Court has explained, "[i]n applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" Wallace v. Jaffree, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985) (emphasis added) (citations omitted); accord Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308, 120 S. Ct. 2266, 2278 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguish a sham secular purpose from a sincere one.'") (citations omitted). While this statement is not particularly elucidating as to the difference between motive and purpose, it does make it clear that the court must look beyond the Chief Justice's stated

purpose to his actual purpose. For example, in Jaffree, the Court specifically examined evidence of the legislative intent contained in the legislative record and the testimony of the challenged bill's sponsor. 472 U.S. at 58, 105 S. Ct. at 2490.

Additionally, the Chief Justice has admitted that certain statements he has made, beyond his oft-repeated statement that the monument was installed "to restore the moral foundation of law," are indicative of his purpose for installing the monument. Specifically, the Chief Justice admits that the speech he gave at the monument's unveiling, various answers he gave in his deposition, and, of course, portions of his trial testimony are evidence of his purpose. The Chief Justice does argue, however, that many of the plaintiffs' other evidentiary submissions constitute evidence of motive and therefore should not be considered by the court in determining the constitutionality of his installation of the monument. These include all evidence relating to following:

> (1) His campaign for Chief Justice: the Chief Justice's campaign referred to him as the "Ten Commandments Judge" and almost everything distributed by the campaign referenced the Ten Commandments. Additionally, the Chief Justice sent a thank-you note to campaign contributors reading, in part, "It is our hope that next year at this time, the Ten Commandments will be displayed in the Alabama Supreme Court, and the acknowledgment of God will be permitted and encouraged in all Alabama public forums under then Chief Justice Moore's leadership."

(2) Interviews he has given on TV and radio: For example, on a segment entitled "One True God," aired by Coral Ridge Ministries as part of a television program in October 2001, the Chief Justice discussed the "long, continuous battle that I have fought over acknowledging God. ... I have put the monument depicting the sovereignty of God and his standards in the Judicial building. And I have no intention of removing them. We will defend it, because it is truth, and you can't deny truth."

(3) His relationship with Coral Ridge Ministries: the Chief Justice has appeared on a number of television and radio programs created by Coral Ridge.

(4) Speeches he has given at different rallies: For example, after he was elected Chief Justice, the Chief Justice appeared at a rally in Tennessee on December 2, 2001, in which he gave a speech stating, in part, that "God gave us our rights; government is to secure it. If it doesn't--if it denies God, it should be abolished."

The plaintiffs, on the other hand, argue that these public statements should be considered by the court in assessing both the Chief Justice's purpose for installing the monument and the effect the monument will have on a reasonable observer.

The court will not resolve this dispute, however, because it is clear from the Chief Justice's trial testimony, as well as the evidence that he concedes reflects his purpose, that he erected the monument with an improper purpose. As such, the court need not resolve the distinction between purpose and

motive, nor need it decide which of the Chief Justice's statements are properly considered by the court in determining his purpose under the Lemon test. Rather, in finding the Chief Justice's purpose unconstitutional, the court has limited its consideration to the speech given by the Chief Justice at the monument's unveiling, the Chief Justice's trial testimony and trial exhibits discussed in parts II(B) and II(C)(1) of this opinion, and the monument itself. The Chief Justice admits that this evidence should be considered to determine his purpose in erecting the monument, and Supreme Court precedent shows that this evidence is properly considered by the court. See Jaffree, 472 U.S. at 58, 105 S. Ct. at 2490.

III.

The court appreciates that there are those who see a clear secular purpose in the Ten Commandments, for they command not only such things as "I am the Lord thy God" and "Thou shalt have no other Gods before me" but also, among other things, that "Thou shalt not kill" and "Thou shalt not steal," and that we should "Honour thy father and thy mother." If all Chief Justice Moore had done were to emphasize the Ten Commandments' historical and educational importance (for the evidence shows that they have been one of the sources of our secular laws) or their importance as a model code for good citizenship (for we all want our children to honor their parents, not to kill, not to steal, and so forth), this court would have a much different case before it. But the Chief Justice did not limit himself to this; he went far, far beyond. He installed a two-and-a-half ton monument in the most prominent place in a

government building, managed with dollars from all state taxpayers, with the specific purpose and effect of establishing a permanent recognition of the "sovereignty of God," the Judeo-Christian God, over all citizens in this country, regardless of each taxpaying citizen's individual personal beliefs or lack thereof. To this, the Establishment Clause says no.[7]

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[7] In Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S. Ct. 2141 (1993), Justice Scalia comments on the "strange notion, that a Constitution which itself gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general." 508 U.S. at 400, 113 S. Ct. at 2151 (Scalia, J., concurring).

With deeper reflection, however, this "notion" may not be so "strange." It is generally accepted that, at the time of the framing of the Constitution, this country was predominantly Christian, and it appears that Christianity was not merely tolerated but viewed as essential to this country's democratic success. George Washington, Farewell Address (September 1796) ("Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."); Alexis De Tocqueville, Democracy in America 445 (George Lawrence trans., J.P. Mayer ed., Perennial Classics 2000) ("Religious nations are therefore naturally strong on the point on which democratic nations are weak; this shows of what importance it is for men to preserve their religion as their conditions become more equal."). Thus, it makes sense that something viewed at the time as so essential as was religion would be given "preferred treatment" by being addressed in the First Amendment to the United States Constitution. But what history also taught at that time was that religion, and particularly Christianity, made this contribution working as a private institution and outside the framework of formal government. Alexis De Tocqueville, Democracy in America 47 (George Lawrence trans., J.P. Mayer ed., Perennial Classics 2000) ("Religion, being free and powerful within its own sphere and content with the position reserved for it, realized that its sway is all the better established because it relies only on its own powers and rules men's hearts without external support."). Indeed, this same history taught that when government interfered with religion, religion (and, in particular, Christianity) suffered. This is evidenced by the many instances in which

The plaintiffs ask that the court enter an injunction requiring Chief Justice Moore to remove his Ten Commandments monument forthwith. The court declines to enter such an injunction at this time. Instead, the court will enter a declaration that Justice Moore's placement of his Ten Commandments monument in the Alabama State Judicial Building was unconstitutional, and will allow Justice Moore thirty days to remove it. If the monument is not removed within thirty days, the court will then enter an injunction requiring Justice Moore to remove it within fifteen days thereafter.

An appropriate judgment will be entered.

JUDGMENT

In accordance with the memorandum opinion entered

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people have been persecuted for their religious beliefs, well-known to anyone who has studied American History.

Thus, the First Amendment gave "preferred treatment" to religion, and, in particular, to Christianity, by assuring that there would be no governmental interference with, including even "endorsement" of, it. In other words, as indeed history has shown, Christianity flourishes best when it is left alone by government. So, it could be argued that, because this country began as a Christian nation, the First Amendment's ban on government interference with religion in general has actually encouraged the flourishing of not just religion but Christianity in particular. Whether the founders in framing the First Amendment intended this (this is, to foster Christianity specifically), the court cannot say, for it lacks adequate historical expertise; but it is an interesting question.

today, it is the ORDER, JUDGMENT, and DECREE of the court that:

(1) Judgment is entered in favor of plaintiffs Stephen R. Glassroth, Melinda Maddox and Beverly Howard, and against defendant Roy S. Moore.

(2) It is DECLARED that defendant Moore's placement of his Ten Commandments monument in the Alabama State Judicial Building violated the Establishment Clause of the First Amendment to the United States Constitution, as incorporated into the Fourteenth Amendment and enforced by 42 U.S.C.A. § 1983. Defendant Moore is given thirty days from the date of this judgment to remove the monument.

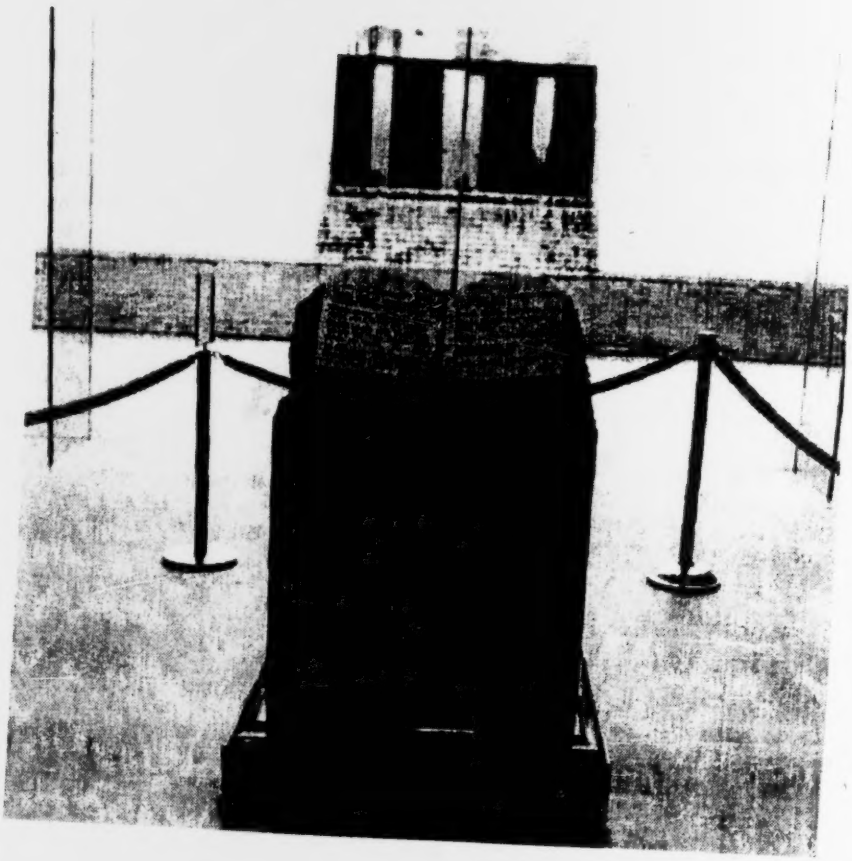
The court retains jurisdiction to impose and enforce an injunction should one become necessary.

It is further ORDERED that costs are taxed against defendant Moore, for which execution may issue.

DONE, this the 18th day of August, 2002.

MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

APPENDIX A
The Ten Commandments Monument



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APPENDIX B

Quotations inscribed on the monument's four sides

Front (North) side

"Laws of nature and of nature's God"--Declaration of Independence

"The laws of nature are the laws of God, whose authority can be superseded by no power on earth"--George Mason [Taken from arguments submitted by George Mason in Robin v. Hardaway, 2 Va. Reports (Jeff.) 109, 114 (Va.1772)]

"The transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed"--James Madison [Taken from The Federalist No. 43, at 295]

"This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this; ... upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these"--William Blackstone [Taken from Volume I of The Commentaries of the Law of England, "Of the Rights of Persons," at 41 (1765)]

Right (West) side

"In God We Trust"--National Motto

"We, the people of the state of Alabama, in order to establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of almighty God, do ordain and establish the following constitution and form of government for the state of Alabama"--Constitution of Alabama

"O thus be it ever when freemen shall stand between their lov'd home and the war's desolation! Blest with vict'ry and peace may the heav'n rescued land praise the power that hath made and preserv'd us a nation! Then conquer we must, when our cause it is just, and this be our motto--'in god is our trust,' and the star-spangled banner in triumph shall wave o'er the land of the free and the home of the brave"--National Anthem

Back (South) side

"So help me God"--Judiciary Act of 1789

"Let it simply be asked, where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in the courts of justice?"--George Washington [Taken from Washington's Farewell Address of 1796]

"The greater part of evidence will always consist of the

testimony of witnesses--this testimony is given under those solemn obligations which an appeal to the God of truth impose; and if oaths should cease to be held sacred, our dearest and most valuable rights would become insecure"--John Jay [Taken from John Jay's charge to the grand jury of the circuit court for the district of Vermont on June 25, 1772, at 284]

Left (East) side

"One nation under God, indivisible, with liberty and justice for all"--Pledge of Allegiance 1954

"The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our government upon the moral directions of the creator"--Legislative History [Taken from the House Report of legislation adopting the Pledge of Allegiance, at 2340]

"Human law must rest its authority ultimately upon the authority of that law which is divine"--James Wilson [Taken from Volume I of The Works of the Honourable James Wilson, at 104-05 (Bird Wilson ed. 1804)]

"And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of god? That they are not to be violated but with his wrath?"--Thomas Jefferson [Taken from Notes on the State of Virginia, at 169]

APPENDIX C

Speech by Justice Moore at monument's unveiling ceremony

First, let me thank you for your attendance here today. We appreciate you coming, and some of you have come from great distances. I thank Mr. Parker, my legal advisor in the Administrative Office of Courts, for that introduction.

By the authority vested in me by the Constitution of the State of Alabama as Chief Justice of the Alabama Supreme Court, as administrative head of the judicial system of this state, by the authority vested in me by Section 41-10-275 as Chief Justice, as the authorized judicial representative of the Unified Judicial System, and finally by the authority vested in the Chief Justice as the authorized representative under the lease of this building in which you stand, I'm pleased to present this monument depicting the moral foundation of our law and hereby authorize it to be placed in the rotunda of the Alabama Judicial Building.

It is altogether fitting and proper that we should do this. By placement of this monument in the rotunda housing the Alabama Supreme Court, the Alabama Court of Criminal Appeals, the Alabama Court of Civil Appeals, the Alabama State Law Library, and the Alabama Administrative Office of Courts, this monument will serve to remind the appellate courts and judges of the circuit and district courts of this state, the members of the bar who appear before them, as well as the people who visit the Alabama Judicial Building, of the truth

stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke "the favor and guidance of Almighty God."

"The institutions of our society are founded on the belief that there is an authority higher than the authority of the State, that there is a moral law which the State is powerless to alter, and that the individual possesses rights conferred by the Creator which government must respect. The Declaration of Independence stated the now familiar theme, We hold these truths to be self- evident, that all men are created equal, that they're endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. In the body of the Constitution as well as the Bill of Rights is enshrined these principles."

Some of you might think the words that I just spoke are my words, carefully structured to fit my own ends; or perhaps a quote from a past long ago, but certainly not true or relevant to our law today. On the contrary, those words are not my words, they're not an ancient quote relevant to law. They're the words of Justice William O. Douglas in 1961 in the case of McGowan v. Maryland.

But today, a mere forty years later, many judges and other government officials across our land deny that there's a higher law. They forbid teaching your children that they're created in the image of Almighty God, and that while they purport all the while that it is government and not God who gave us our rights. Not only have they turned away from those

absolute standards which form the basis of our morality and the moral foundation of our law, but they have divorced the Constitution and the Bill of Rights from these principles. As they have sown the wind, so we have reaped the whirlwind, in our homes, in our schools and in our workplaces.

When I ran for the office of Chief Justice of the Alabama Supreme Court, I made a pledge to restore the moral foundation of law. It is axiomatic that to restore morality, we must first recognize the source of that morality. From our earliest history in 1776, when we were first pleased to be called the Untied States of America, our forefathers recognized the sovereignty of God.

As late as 1954, the United States Congress placed in our Pledge of Allegiance the word "under God," and said the inclusion of God in our pledge, therefore, would further acknowledge the dependence of our people and our government upon the moral directions of the Creator. Judges, legislators, and executive officers around our country have, since our nation's birth, consistently pledged under oath, "so help me God," to uphold the Constitution.

Immediately after my election in November of 2000, I contacted Mr. Richard Hahnemann, an accomplished sculptor, to assist me in the construction and design of this monument. Based upon my specifications, he worked, together with myself and my legal assistant and attorney, Mr. Stephen Melchior, for the past eight months to complete this project.

I would like to point out that no tax funds are used in the construction or installation, which was accomplished last evening so as not to conflict with this workplace. I would like to recognize Clark Memorial of Birmingham, Mr. Pierre Tourney, Sr., Mr. Pierre Tourney, Jr., for their help in the construction, design and installation, as well as the transportation of this monument to this building.

And what an appropriate date this is. For it was on August 1st of 1776, exactly 225 years ago today, that Samuel Adams, the father of the American Revolution, stood before a rather large crowd at the Philadelphia State House. And on its steps, he delivered a speech prior to the formal signing of the Declaration of Independence on August 2nd of 1776. He began by stating, "We have explored the temple of royalty and found that the idol that we have bowed down to has eyes which see not, ears that hear not our prayers, and a heart like the nether millstone."

Today a cry has gone out across our land for the acknowledgment of that God upon whom this nation and our laws were founded and for those simple truths which our forefathers found to be self-evident; but once again, we find that those cries have fallen upon eyes that have seen not, ears that hear not our prayers, and hearts much like that nether millstone.

Samuel Adams concluded his remarks by saying, "We have this day restored the Sovereign, to whom alone all men ought to be obedient. He reigns in Heaven and with a propitious eye beholds his subjects assuming that freedom of thought and

dignity of self-direction which he bestowed upon them. From the rising to the setting sun, may His kingdom come." And may this day mark the restoration of the moral foundation of law to our people and the return to the knowledge of God in our land.

This monument, ladies and gentlemen, tells a story. If you look to the front, you'll see on the inset, "The Laws of Nature and of Nature's God." It was on those laws, the will of the Maker, upon which the Declaration of Independence was premised and upon which the Constitution was predicated.

James Madison, for example, the chief architect of the Constitution, said we were entitled to have a constitution because of the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed.

They knew the law. The law was clearly written by Sir William Blackstone, which was the law of this country for many, many decades. He said, "This law of nature, being co-eval with mankind and dictated by God himself, is, of course, superior in obligations to any other. It is binding over all the globe in all countries and at all times, and no humans laws are of any validity if contrary to this." This law of nature and the law of revelation pin all human laws on these two foundations.

On each side of this monument, you'll see quotes from various presidents. For example, George Washington, on the back, said, "Let it simply be asked, where is the security for

property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in our courts of justice."

The first Chief Justice, John Jay, also with President Washington, said, "If testimony of witnesses, if the oaths ever cease to be held sacred, our dearest and most precious rights will become insecure."

On the right side as you face it, you'll see the Constitution and the Preamble of Alabama, which says that we must invoke the favor and guidance of Almighty God; but you'll also sing--see that National Anthem. Oh, you won't see the first stanza, "Oh, say can you see"--you know it very well--"by the dawn's early light." You'll see the verse we neglect today: "Thus be it ever when freemen shall stand between their loved home and the war's desolation, blest with vict'ry and peace. May the heaven rescued land praise the power that has made and preserved this nation. And conquer we must when our cause it is just. And this be our motto--in god is our trust. And the star-spangled banner in triumph shall wave over the land of the free and the home of the brave."

Indeed, in 1956, the United states Congress, by act of Congress, by law today, made "In God We Trust" our national anthem--our national motto. "So help me God," by which we pledge to uphold the constitution, has been around since 1789, when the Judiciary Act established that as the basis of our oath.

You'll see quotes from that famous third President of the

United States, Thomas Jefferson. He said, "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God, that they're not to be violated but with his wrath?" Indeed, I tremble for my country when I reflect that God is just and that His justice cannot sleep forever.

Surrounding this monument, you see every ounce of support for the acknowledgment of the sovereignty of that God and those absolute standards upon which our laws are based. Oh, this isn't surrounding the plaque with history, historical documents. All history supports the acknowledgment of God. You'll find no documents surrounding the Ten Commandments because they stand alone as an acknowledgment of that God that's contained in our pledge, contained in our motto, and contained in our oath.

I thank you very much for your attendance today. And I'll allow any questions to be answered by my public information officer and my attorney. Thank you.

APPENDIX D

Quotations inscribed on the Moral Foundation of Law plaque

"A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law."--Martin Luther King, Jr., Letter from Birmingham Jail, April 16, 1963

"The first work of slavery is to mar and deface those characteristics of its victims which distinguish men from things, and persons from property. Its first aim is to destroy all sense of high moral and religious responsibility. It reduces man to a mere machine. It cuts him off from his Maker, it hides him from the laws of God."--Frederick Douglass, December 1, 1850

335 F.3d 1282 (11th Cir. 2003)
2003 WL 21499258 (11th Cir.(Ala.))

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Stephen R. GLASSROTH, Beverly J. Howard, Plaintiffs-Appellees,

v.

Roy S. MOORE, Chief Justice of the Alabama Supreme Court, Defendant-Appellant.

Melinda Maddox, Plaintiff-Appellee,

v.

Roy S. Moore, in his official capacity as Administrative Head of the Alabama
Judicial System, Defendant-Appellant.

Nos. 02-16708, 02-16949.

July 1, 2003.

Herbert W. Titus, Virginia Beach, VA, Phillip L. Jauregui, Jr., Gray & Jauregui, LLP, Birmingham, AL, for Moore.

Marc D. Stern, New York City, Ayesha N. Khan, American United, Washington, DC, William Z. Messer, Robert J. Varley, Varley & Messer, L.L.P., Morris S. Dees, Rhonda Brownstein, Danielle Jeannine Lipow, J. Richard Cohen,

Southern Poverty Law Center, Robert Marc Weinberg, Thomas, Means & Gillis, P.C., Montgomery, AL, for Plaintiffs-Appellees.

Peter A. Gentala, Scottsdale, AZ, for Amicus, Alliance Defense Fund Law Ctr.

Troy R. King, Montgomery, AL, for Amicus Governor Riley.

Edward Lawrence White, III, Thomas Moore Law Ctr., Ann Arbor, MI, for Amicus Thomas Moore Law Ctr.

Robert K. Skolrood, Scoggin & Skolrood Law Firm, Roanoke, VA, for Amicus Wallbuilders Inc.

K. Hollyn Hollman, Washington, DC, for Amicus Alabama Clergy.

John C. Eastman, c/o Chapman Univ. School of Law, Orange, CA, for Amicus Claremont Institute Ctr. for Constitutional.

Benjamin F. Holt, Washington, DC, for Amicus American-Arab Anti- Discrimination Committee.

Steven K. Green, American United, Salem, OR, for Amicus Legal Historians & Law Scholars.

James Michael Johnson, Shreveport, LA, Robert

Benjamin Wolinsky, Washington, DC, for Amicus Curiae.

Appeals from the United States District Court for the Middle District of Alabama.

Before EDMONDSON, Chief Judge, CARNES, Circuit Judge, and STORY,* District Judge.

CARNES, Circuit Judge:

[*1] The Chief Justice of the Alabama Supreme Court installed a two-and-one- half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building. He did so in order to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo- Christian God over both the state and the church. And he rejected a request to permit a monument displaying a historically significant speech in the same space on the grounds that "[t]he placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument." *Glassroth v. Moore,* 229 F.Supp.2d 1290, 1297 (M.D.Ala.2002).

The monument and its placement in the rotunda create the impression of being in the presence of something holy and sacred, causing some building employees and visitors to consider the monument an appropriate and inviting place for

* Honorable Richard W. Story, United States District Judge for the Northern District of Georgia, sitting by designation.

prayer. Three attorneys who do not consider the monument appropriate at all and who do not share the Chief Justice's religious beliefs brought two separate lawsuits to have the monument taken out. Agreeing with them that it violated the Establishment Clause of the First Amendment, the district court ordered the monument removed. *Glassroth,* 229 F.Supp.2d at 1319; *Glassroth v. Moore,* 242 F.Supp.2d 1067 (M.D.Ala.2002). The Chief Justice appealed. We affirm.

I.

Because "[i]n religious-symbols cases, context is the touchstone," *King v. Richmond County,* 331 F.3d 1271, 1282, slip op. at 2552 (11th Cir.2003), we set out the relevant facts in some detail, most of which are pulled from the district court's opinion, but a few of which we have drawn from undisputed testimony or other evidence in the record.

Chief Justice Moore began his judicial career as a judge on the Circuit Court of Etowah County, Alabama. After taking office he hung a hand-carved, wooden plaque depicting the Ten Commandments behind the bench in his courtroom and routinely invited clergy to lead prayer at jury organizing sessions. Those actions generated two high-profile lawsuits in 1995 based on the Establishment Clause, one filed by a nonprofit organization seeking an injunction and the other brought by the State of Alabama seeking a declaratory judgment that then- Judge Moore's actions were not unconstitutional. Both suits were dismissed on justiciability grounds. *Ala. Freethought Ass'n v. Moore,* 893 F.Supp. 1522 (N.D.Ala.1995);

Alabama ex rel. James v. ACLU, 711 So.2d 952 (Ala.1998); *see Glassroth,* 229 F.Supp.2d at 1293-94.

[*2] During his campaign for the Chief Justice position in the November 2000 election, then-Judge Moore's campaign committee, capitalizing on name recognition from the lawsuits, decided to refer to him as the "Ten Commandments Judge." Although the Chief Justice says he never described himself that way, he did not disagree with his campaign committee's decision. As a result, most of his campaign materials, including billboards, television and radio commercials, telephone scripts, and mailings, described him as the "Ten Commandments Judge" or otherwise referred to the Ten Commandments. The central platform of his campaign was a promise "to restore the moral foundation of law." *Glassroth,* 229 F.Supp.2d at 1294.

After he was elected, Chief Justice Moore fulfilled his campaign promise by installing the Ten Commandments monument in the rotunda of the Alabama State Judicial Building. *Id.* at 1294, 1303. That building houses the Alabama Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, the state law library, and the state's Administrative Office of the Courts. The Chief Justice, as administrative head of the Alabama judicial system and as lessee of the Judicial Building, has final authority over the decoration of the rotunda and whether to put any displays in the building. *See* Ala. Const. Amend. 328, § 6.10; Ala.Code § 41-10-275. Chief Justice Moore placed the monument in the rotunda of the Judicial Building without the advance approval or even knowledge of any one of the other eight justices of the

Alabama Supreme Court. All decisions regarding it were made by him. *Glassroth,* 229 F.Supp.2d at 1294. He did not use any government funds in creating or installing the monument. *Id.*

Thousands of people enter the Judicial Building each year. In addition to attorneys, parties, judges, and employees, every fourth grader in the state is brought on a tour of the building as part of a field trip to the state capital. No one who enters the building through the main entrance can miss the monument. It is in the rotunda, directly across from the main entrance, in front of a plate-glass window with a courtyard and waterfall behind it. After entering the building, members of the public must pass through the rotunda to access the public elevator or stairs, to enter the law library, or to use the public restrooms. A person walking to the elevator, stairs, or restroom will pass within ten to twenty feet of the monument. The Chief Justice chose the location of the monument so that everyone visiting the Judicial Building would see it. *Id.*

The 5280-pound granite monument is "approximately three feet wide by three feet deep by four feet tall." *Id.* Two tablets with rounded tops are carved into the sloping top of the monument. Excerpts from *Exodus* 20:2-17 of the King James Version of the Holy Bible, the Ten Commandments, are chiseled into the tablets. The left one reads:

> [*3] I am the Lord thy God
> THOU SHALT HAVE NO OTHER GODS BEFORE ME
> THOU SHALT NOT MAKE UNTO THEE ANY

GRAVEN IMAGE
THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN
REMEMBER THE SABBATH DAY, TO KEEP IT HOLY

The right one reads:

Honour thy father and thy mother
THOU SHALT NOT KILL
THOU SHALT NOT COMMIT ADULTERY
THOU SHALT NOT STEAL
THOU SHALT NOT BEAR FALSE WITNESS
THOU SHALT NOT COVET[1]

Glassroth, 229 F.Supp.2d at 1294-95; *id.* at 1320 (App. A--photograph of the monument).

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[1] Observant readers will notice that the tablets contain a total of eleven statements. Different faiths dispute how the sixteen verses in *Exodus* 20:2-17 should be divided to reflect the later references to "Ten Commandments." *Exodus* 34:28; *Deuteronomy* 4:13, 10:4. As one expert testified at trial, "[e]ach tradition has struggled with how they should be numbered." For example, many Jews and some Christians consider the "First Commandment" to be "I am the Lord thy God," while others consider the First Commandment to be "Thou shalt [or You shall] have no other gods before me." More about the significance of this kind of disagreement for Establishment Clause purposes is found in note 3, below.

In any event, the division of the commandments between two tablets is significant. As the Chief Justice (who called them "tables") explained: "the first table represents the duties which we owe to GOD," and "[t]he second table represents the duties which we owe to each other." 1st Supp. Rec. Vol. 2 at 150.

Below the Ten Commandments, each side of the monument contains one large-sized and several smaller-sized quotations. The quotations are excerpted from various historical documents and authorities. They are described and set out in full in the district court's opinion. *Id.* at 1295; *id.* at 1320-21 (App. B-- providing full quotations of the monument's text). The quotations from secular sources were placed below the Ten Commandments because of Chief Justice Moore's belief that the words of mere men could not be placed on the same plane as the Word of God. *Id.* at 1295.

"Due to the slope of the monument's top and the religious appearance of the tablets, the tablets call to mind an open Bible resting on a lectern." *Id.* The appearance and location of the monument itself give one "the sense of being in the presence of something not just valued and revered (such as an historical document) but also holy and sacred." *Id.* Employees and visitors to the building consider it an appropriate and inviting place for prayer. *Id.*

The monument was installed after the close of business during the evening of July 31, 2001. The Chief Justice has explained that it was done at night to avoid interrupting the normal business of the building. The installation of the monument that night was filmed by Coral Ridge Ministries, an evangelical Christian media outreach organization. *Id.* at 1294. The organization has used its exclusive footage of the installation to raise funds for its own purpose and for Chief Justice Moore's legal defense, which it has underwritten. *Id.* at 1304 n. 2.

At the public unveiling of the monument the day after its installation, Chief Justice Moore delivered a speech commemorating the event, and in that speech he talked about why he had placed the monument, which he described as one "depicting the moral foundation of our law," where he did. He explained that the location of the monument was "fitting and proper" because:

> this monument will serve to remind the appellate courts and judges of the circuit and district courts of this state, the members of the bar who appear before them, as well as the people who visit the Alabama Judicial Building, of the truth stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke "the favor and guidance of Almighty God."[2]

[*4] *Id.* at 1321-24 (App. C--reproducing the full text of Chief Justice Moore's remarks at the unveiling ceremony). During that speech, the Chief Justice criticized government officials who "forbid teaching your children that they are created in the image of Almighty God" and who "purport all the while that it is a government and not God who gave us our rights," because they have "turned away from those absolute standards which form

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[2] *See* Ala. Const. Pmbl. ("We, the people of the State of Alabama, in order to establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama.").

the basis of our morality and the moral foundation of our law" and "divorced the Constitution and the Bill of Rights from these principles." *Id.* at 1322. Recalling his campaign "pledge to restore the moral foundation of law," he noted that "[i]t is axiomatic that to restore morality, we must first recognize the source of that morality," and that "our forefathers recognized the sovereignty of God." *Id.* He noted during the speech that no government funds had been expended on the monument.

The Chief Justice described various acknowledgments of God throughout this country's history, some of which, he pointed out, are inscribed on the monument. He proclaimed that the unveiling of the monument that day "mark[ed] the restoration of the moral foundation of law to our people and the return to the knowledge of God in our land." *Id.* at 1321. In closing, he told the audience that they would "find no documents surrounding the Ten Commandments because they stand alone as an acknowledgment of that God that's contained in our pledge, contained in our motto, and contained in our oath." *Id.* at 1324.

During the trial the Chief Justice testified candidly about why he had placed the monument in the rotunda. The following exchanges between him and one of the plaintiffs' attorneys establish that purpose:

> Q [W]as your purpose in putting the Ten Commandments monument in the Supreme Court rotunda to acknowledge GOD's law and GOD's sovereignty? ...

A Yes.

1st Supp. Rec. Vol. 2 at 100.

> Q ...Do you agree that the monument, the Ten Commandments monument, reflects the sovereignty of GOD over the affairs of men?
> A Yes.
> Q And the monument is also intended to acknowledge GOD's overruling power over the affairs of men, would that be correct? ...
> A Yes.
> Q ... [W]hen you say "GOD" you mean GOD of the Holy Scripture?
> A Yes.

1st Supp. Rec. Vol. 3 at 34.

The rotunda is open to the public, but it is not a public forum where citizens can place their own displays. *Glassroth,* 229 F.Supp.2d at 1303. Chief Justice Moore has denied the two requests that have been made to place other displays in the rotunda. He did so because he believed that those displays would have been inconsistent with the rotunda's theme of the moral foundation of law. An Alabama State Representative asked the Chief Justice if a monument containing the Rev. Dr. Martin Luther King Jr.'s famous "I Have a Dream" speech could be placed in the rotunda. The Chief Justice denied the request in a letter, stating that, "The placement of a speech of any man alongside the revealed law of God would tend in consequence

to diminish the very purpose of the Ten Commandments monument." *Id.* at 1297. He also denied an atheist group's request to display a symbol of atheism in the rotunda. *Id.*

The Chief Justice did add two smaller displays to the rotunda at some point after the Ten Commandments monument was installed. The first, a plaque entitled "Moral Foundation of Law," contains a quotation from the Rev. Dr. Martin Luther King Jr.'s letter from the Birmingham jail speaking of just laws and "the moral law or law of God," and a quotation from Frederick Douglass speaking of slavery as hiding man "from the laws of God." *Id.* at 1324-25 (App. D--providing a full quotation of the plaque). That plaque, which the Chief Justice paid for with his own money, measures forty-two inches by thirty- two inches. *Id.* at 1296. The second display is a brass plaque that contains the Bill of Rights. That plaque, measuring thirty inches by thirty-six inches, had been found in a box in the building. The Chief Justice added both plaques because he thought that they "comported with the 'moral foundation of law theme.' " *Id.* The two plaques are inconspicuous compared to the Ten Commandments monument. Each is not only much smaller than the monument, but also is located seventy-five feet from it. A person standing in front of the monument cannot see either plaque. Nothing about their location or appearance indicates that they are connected to the monument. *Id.*

[*5] The three plaintiffs are practicing attorneys in the Alabama courts. As a result of their professional obligations, each of them has entered, and will in the future have to enter, the Judicial Building. Because of its location, they necessarily

come in contact with the monument. The monument offends each of them and makes them feel like "outsiders." Because of the monument, two of the plaintiffs have chosen to visit the Judicial Building less often and enjoy the rotunda less when they are there. One of those two has avoided the building to the extent of purchasing law books and online research services instead of using the library, and hiring a messenger to file documents in the courts located in the Judicial Building. *Id.* at 1297.

II.

Pursuant to 42 U.S.C. § 1983, the three plaintiffs sued Chief Justice Moore in his official capacity as administrative head of Alabama's judicial system, claiming that his actions violated the Establishment Clause of the First Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment. They sought a declaratory judgment that his actions were unconstitutional and an injunction to force him to remove the monument. Prior to trial, Chief Justice Moore's counsel requested--it may have been done jointly, but it is unclear from the record whether the plaintiffs actually joined or simply did not object to the request--that the district court judge visit the monument. The judge did so, accompanied by the attorneys for both sides. *Id.* at 1295.

After a seven-day bench trial, the district court concluded that Chief Justice Moore's actions violated the Establishment Clause because his purpose in displaying the monument was non-secular and because the monument's primary effect is to

advance religion. *Id.* at 1299, 1304. The court entered judgment to that effect and gave the Chief Justice thirty days to remove the monument voluntarily. After he declined to do so, the district court entered an order enjoining him from failing to remove the monument from the public areas of the Judicial Building. *Glassroth v. Moore,* 242 F.Supp.2d 1067 (M.D.Ala.2002). The Chief Justice appealed, and the district court stayed its injunction pending appeal. *Glassroth v. Moore,* 242 F.Supp.2d 1068 (M.D.Ala.2002).

III.

[*6] As this Court recently explained, Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts. *King v. Richmond County,* 331 F.3d 1271, ----, slip op. 2541 (11th Cir.2003). As we have already noted, the facts set out in this opinion are taken largely from the district court's findings. The Chief Justice attacks those findings on several bases.

A.

First, he contends that the district court judge should not have made any factfindings based upon his viewing of the monument and its surrounds. The judge unquestionably made important factfindings as a result of what he saw when he viewed the monument and the rotunda in which it is located. That was error, the Chief Justice argues, because he had thought that the only purpose of the district court's view of the monument and the area around it was to provide the court with

a physical context within which to assess the evidence admitted in the courtroom.

The sole decision cited by the Chief Justice in connection with the viewing issue is *Lillie v. United States,* 953 F.2d 1188 (10th Cir.1992), which involved a judge's uninvited viewing of the scene of the accident, outside the presence of counsel and without their knowledge. The Tenth Circuit concluded that was error because, "[w]ithout presence of counsel there is no way to be certain that the premises viewed are in the same condition as when the event occurred, or that the court does not view the wrong premises or objects." *Id.* at 1191. That is not a problem in this case, because the district court judge undertook the view only after fully discussing the matter with counsel for both sides and scheduling the time of the viewing with counsel in advance. And he undertook the view in their presence. There was no procedural irregularity or lack of notice.

The district court told the attorneys early in the status conference that if the case was decided on summary judgment motions, the court would not be making any findings of fact from its view. That is, of course, correct. Courts do not find facts when deciding summary judgment motions, but this case was not decided on summary judgment. As we will point out shortly, counsel for both sides fully expected that the district court judge would be considering the facts and circumstances he observed during the view if the case was decided by trial, as it was, instead of on summary judgment.

To the extent the Chief Justice is arguing that factfinders should never find facts from what they observe at a view but should only use what they see to put into context the facts they hear in the courtroom, we agree with the Tenth Circuit that "such a distinction is only semantic, because any kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence." *Id.* at 1190; *accord Snyder v. Massachusetts,* 291 U.S. 97, 121, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934) (the "inevitable effect [of a view] is that of evidence, no matter what label the judge may choose to give it"), *overruled on other grounds by Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *In re Application to Take Testimony,* 102 F.R.D. 521, 524 (E.D.N.Y.1984) ("Authorities now generally agree that the view provides independent evidence."); *Foster v. State,* 70 Miss. 755, 12 So. 822, 823 (1893) ("To say the jury cannot receive evidence by simply viewing the scene is to insult common sense. The most convincing evidence is made by the sense of sight. The juror, on the view, sees, and thinks he knows what he sees, with all the conclusions flowing therefrom."); 6 John Henry Wigmore, *Wigmore on Evidence* § 1803 (James H. Chadbourn rev.1976) (the jury on a view is receiving evidence because "to view the thing itself in issue--i.e., the premises--is undoubtedly to consult a source of proof"); 2 Jack B. Weinstein, *Weinstein's Federal Evidence* (2d ed.) § 403.07[4] (2d ed. 2003) ("[T]he modern position is that the view does provide independent evidence."). Just as pictures of the monument and the rotunda that were submitted as exhibits are evidence, so too

is what the judge saw when he viewed the actual monument and its setting.

[*7] In any event, "[i]t is 'a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.' " *United States v. Ross*, 131 F.3d 970, 988 (11th Cir.1997) (quoting *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 n. 4 (11th Cir.1985)). Counsel for Chief Justice Moore urged the district court judge to undertake a view. When the judge said at a status conference that if summary judgment was granted the issue of looking at the monument would be moot, counsel for the Chief Justice disagreed, protesting that: "I believe it's almost incumbent upon the Court to walk into the Judicial Building," and "I still think it's almost necessary to take a look at this yourself because of the proximity and also because of just the manner in which the facts play out here." Rec. Vol. 12 at 15.

The district court judge asked if the lawyers were going to make arrangements for him to see the monument and point out what he was to see. Counsel for the plaintiffs answered, without objection, that both sides had agreed: "you just walk in the front door and everything in the rotunda is fair game. And we believe that the lawyers shouldn't speak unless you've got a question for us. And the lawyers would be there, none of their clients would be there, and that would be it." Rec. Vol. 12 at 17.

[*8] Counsel for the Chief Justice agreed with that statement about how the view should be conducted, and he made clear that the whole point was for the district court judge

to be able to gather facts about the monument and its setting, saying:

> But I think with either the summary judgment motion or response, and/or the pretrial briefs, that there's going to be a lot of facts in there that will probably give each side's impression of how they interpret the inside of the rotunda. But I agree with [plaintiffs' counsel] that you're a jury. You have to walk in and see what you see and then [sic] just like a juror would.

Rec. Vol. 12 at 16-17.

During argument about the cross-motions for summary judgment, and before the view took place, counsel for the Chief Justice contended that summary judgment was improper because the district court needed to view the monument as part of the necessary "inquiry into the facts and circumstances":

> [T]he issue with regard to how a reasonable person would view the monument would require an examination of what you might call social facts, which would require at least an examination of the monument itself. This is why we believe it's important for you to go into the rotunda and view that monument and view the setting itself. Unless you see it yourself, and since the reasonable person test is a test that's supposed to be applied by the judge, it would be

> difficult for the judge to apply that particular test unless there was an inquiry into the facts and circumstances with regard to this matter.

Rec. Vol. 13 at 43-44. So eager was he to have the district court judge conduct the view "just like a juror would," that counsel for the Chief Justice volunteered his help in arranging parking for the district court judge at the Judicial Building. Any conceivable error was not just invited error, but invited error with a parking space.

B.

The Chief Justice also complains that the district court did not state its findings from the view into the record so that the parties would have had an opportunity to challenge them before the court issued its opinion. He never asked the court to do that, and factfinders traditionally do not state facts into the record before deciding the case; juries never do. The parties were on notice that the court might make factfindings from what it saw during the view, and if either side had wanted those findings stated into the record before a decision was made, it should have requested that extraordinary procedure. Since neither side asked for that procedure, we need not decide whether it would have been necessary or appropriate if requested.

C.

[*9] In a related challenge to the district court's

findings, the Chief Justice argues that the district court judge should not have relied upon his subjective impressions from viewing the monument and its surrounding space. Recall that this same party's counsel had urged the district court judge to undertake a view in order to find the "social facts" about how a reasonable person would see the monument and its surroundings. When the district court described how the monument and its presentation in the rotunda gave one a "sense of being in the presence of something not just valued and revered (such as an historical document) but also holy and sacred," *Glassroth,* 229 F.Supp.2d at 1295, the court was articulating findings about the impression the monument made on the viewer, and would make on a reasonable person viewing it. It was required to do that in order to apply the reasonable person test.

D.

Apart from the factfinding issues arising from the view, Chief Justice Moore also argues that the district court made factfindings not supported by the record. We review district court factfindings only for clear error, and as we have explained, "[w]e cannot hold a district court's finding of fact clearly erroneous unless, in view of the entire record, we are 'left with a definite and firm conviction that a mistake has been committed.' " *Eng'g Contractors Ass'n v. Metropolitan Dade County,* 122 F.3d 895, 904 (11th Cir.1997) (quoting *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)). We cannot reach the requisite definite and firm conviction that a mistake in factfinding has

been made, the Supreme Court has told us, where the district court has chosen one of two plausible views of the evidence. *Anderson,* 470 U.S. at 574, 105 S.Ct. at 1511 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") (citations omitted).

The specific factfinding relating to the merits of the constitutional issue that the Chief Justice challenges is the district court's finding that "visitors and building employees consider the monument an appropriate, and even compelling, place for prayer." *Glassroth,* 229 F.Supp.2d at 1295. That is at least a plausible view of the evidence in light of the testimony of one of the plaintiffs that she had witnessed a group in prayer around the monument, and the testimony of a building employee that on several occasions he had prayed in front of the monument by himself and with other employees, silently and out loud.

IV.

[*10] We turn now to the legal issues. The threshold one is whether these plaintiffs have standing to bring the lawsuits that led to these appeals. The Chief Justice disputes the district court's conclusion that they do, a conclusion we review *de novo. Ga. State Conf. of NAACP Branches v. Cox,* 183 F.3d

1259, 1262 (11th Cir.1999).

> The applicable principles are well-settled:
>
> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 162, 117 S.Ct. 1154, 1161, 137 L.Ed.2d 281 (1997) (citations omitted). For Establishment Clause claims based on non- economic harm, the plaintiffs must identify a "personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Ams. United for Sep. of Church & State, Inc.,* 454 U.S. 464, 485, 102 S.Ct. 752, 765, 70 L.Ed.2d 700 (1982). In this type of case, plaintiffs have standing if they are " 'directly affected by the laws and practices against [which] their complaints are directed,' " *Saladin v. City of Milledgeville,* 812 F.2d 687, 692 (11th Cir.1987) (quoting *Sch. Dist. of Abington Township v. Schempp,* 374 U.S. 203, 224 n. 9, 83 S.Ct. 1560, 1572 n. 9, 10 L.Ed.2d 844 (1963)), such as where the plaintiffs are " 'forced to assume special burdens' to avoid 'unwelcome religious exercises,' " *ACLU v. Rabun County Chamber of Commerce,*

Inc., 698 F.2d 1098, 1107 (11th Cir.1983) (per curiam) (quoting *Valley Forge,* 454 U.S. at 487 n. 22, 102 S.Ct. at 766 n. 22).

The location of the monument in the rotunda of the Judicial Building makes it impossible for anyone using the stairs, elevators, or restrooms to avoid it. Everyone going to the state law library in the building has to walk past the monument. *Glassroth,* 229 F.Supp.2d at 1294. The three plaintiffs are attorneys whose professional duties require them to enter the Judicial Building regularly, and when they do so they must pass by the monument. None of them shares the Chief Justice's religious views, and all of them consider the monument offensive. It makes them feel like outsiders, and two of the plaintiffs have altered their behavior as a consequence. *Id.* at 1297. As we noted earlier, one of those two has incurred expenses in order to minimize contact with the monument, purchasing law books and online research to minimize use of the state law library and hiring messengers to file documents in the courts located in the building.

Under these facts, the two plaintiffs who have altered their behavior as a result of the monument have suffered and will continue to suffer injuries in fact sufficient for standing purposes. *See Schempp,* 374 U.S. at 224 n. 9, 83 S.Ct. at 1572 n. 9 (holding that school children and parents had standing to challenge a state law requiring the Bible to be read every morning in public schools); *Saladin,* 812 F.2d at 692-93 (holding that city residents had standing to challenge the city's placement of the word "Christianity" on its official seal because they regularly received correspondence bearing the seal and the

seal made them feel like "second class citizens"); *Rabun County,* 698 F.2d at 1107-08 (holding that state residents who used public parks had standing to challenge the placement of a lighted Latin cross in a public park where they were unwilling to camp in that park because of the "physical and metaphysical impact of the cross"). Further, a favorable decision will likely redress their injuries. If Chief Justice Moore is required to remove the monument from the public area of the Judicial Building, the plaintiffs will no longer have to observe it or take actions to avoid going into the building.

[*11] Having concluded that those two plaintiffs have standing, we are not required to decide whether the other plaintiff, the one who has not altered his behavior as a result of the monument, has standing. *Rabun County,* 698 F.2d at 1108-09 ("Because we have determined that at least these two individuals have met the requirements of Article III, it is unnecessary for us to consider the standing of the other plaintiffs in this action."); *accord Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981).

Contrary to Chief Justice Moore's contention, the injuries the plaintiffs assert are not based solely on their disagreement with his views about religion and government, which would be a non-redressable injury. While the Chief Justice's views may aggravate the emotional injury the plaintiffs suffer from viewing the monument, the worst of the wound is inflicted by the monument itself. The plaintiff who has incurred expense and inconvenience to avoid entering the building has

done so not because it houses the Chief Justice's chambers, but because the monument is there. The district court did not err by declining to dismiss the cases on standing grounds. Now to the merits of the constitutional issue.

V.

Because of this country's "history and tradition of religious diversity that dates from the settlement of the North American Continent," the Founders included in the Bill of Rights an Establishment Clause which prohibits any law "respecting an establishment of religion." *County of Allegheny v. ACLU,* 492 U.S. 573, 589, 109 S.Ct. 3086, 3099, 106 L.Ed.2d 472 (1989). In the more than two centuries since that clause became part of our Constitution, the Supreme Court has arrived at an understanding of its general meaning, which is that "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs." *Id.* at 590-91, 109 S.Ct. at 3099 (footnotes omitted). Some aspects of the Chief Justice's position in this case are aimed directly at that understanding. Take, for example, the one we address next.

A.

[*12] The First Amendment does not say that no government official may take any action respecting an

establishment of religion or prohibiting the free exercise thereof. It says that "Congress shall make no law" doing that. Chief Justice Moore is not Congress. Nonetheless, he apparently recognizes that the religion clauses of the First Amendment apply to all laws, not just those enacted by Congress. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 15, 67 S.Ct. 504, 511, 91 L.Ed. 711 (1947) (holding that the Establishment Clause applies to the states through the Due Process Clause of the Fourteenth Amendment). Even with that concession, his position is still plenty bold. He argues that because of its "no law" language, the First Amendment proscribes only laws, which should be defined as "rule[s] of civil conduct ... commanding what is right and prohibiting what is wrong." Brief of Appellant at 19 (quoting 1 William Blackstone, *Commentaries* *44). Any governmental action promoting religion in general or a particular religion is free from constitutional scrutiny, he insists, so long as it does not command or prohibit conduct. The monument does neither, but instead is what he calls "a decorative reminder of the moral foundation of American law." Brief of Appellant at 19.

The breadth of the Chief Justice's position is illustrated by his counsel's concession at oral argument that if we adopted his position, the Chief Justice would be free to adorn the walls of the Alabama Supreme Court's courtroom with sectarian religious murals and have decidedly religious quotations painted above the bench. Every government building could be topped with a cross, or a menorah, or a statue of Buddha, depending upon the views of the officials with authority over the premises. A creche could occupy the place of honor in the

lobby or rotunda of every municipal, county, state, and federal building. Proselytizing religious messages could be played over the public address system in every government building at the whim of the official in charge of the premises.

However appealing those prospects may be to some, the position Chief Justice Moore takes is foreclosed by Supreme Court precedent. *Allegheny County*, 492 U.S. at 612, 109 S.Ct. at 3110, which held unconstitutional the placement of a creche in the lobby of a courthouse, stands foursquare against the notion that the Establishment Clause permits government to promote religion so long as it does not command or prohibit conduct. *Id.*, 109 S.Ct. at 3110 ("To be sure, some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire, which would contradict 'the logic of secular liberty' it is the purpose of the Establishment Clause to protect.") (citation omitted). To the same effect is the decision in *Lee v. Weisman*, 505 U.S. 577, 587, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992), where the Supreme Court explained that, "[a] school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." And in *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir.1983), *prob. juris. noted and aff'd in part*, 466 U.S. 924, 104 S.Ct. 1704, 80 L.Ed.2d 178, *cert. denied sub. nom. Bd. of Sch. Comm'rs of Mobile County v. Jaffree*, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181, and *aff'd in part*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29

(1985), this Court concluded that "[i]f a statute authorizing the teachers' activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional." *Id.* at 1533-35.

B.

[*13] Another of the Chief Justice's broad-based attacks on the application of the Establishment Clause to his conduct involves the definition of religion. He insists that for First Amendment purposes religion is "the duty which we owe to our Creator, and the manner of discharging it"; nothing more, nothing less. Brief of Appellant at 11-12 (quoting Virginia Declaration of Rights Art. I, § 16 (1776)). The Chief Justice argues that the Ten Commandments, as he has presented them in the monument, do not involve the duties individuals owe the Creator, and therefore they are not religious; instead, he says, they represent the moral foundation of secular duties that individuals owe to society.

The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess belief in the Judeo-Christian God; indeed, it includes the lack of any faith. *Allegheny County,* 492 U.S. at 590, 109 S.Ct. at 3099 ("Perhaps in the early days of the Republic these words [of the Establishment Clause] were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.") (internal marks

omitted); *Wallace v. Jaffree,* 472 U.S. 38, 52-53, 105 S.Ct. 2479, 2487-88, 86 L.Ed.2d 29 (1985) ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.") (footnote omitted); *Torcaso v. Watkins,* 367 U.S. 488, 495, 81 S.Ct. 1680, 1683-84, 6 L.Ed.2d 982 (1961). Chief Justice Moore's proffered definition of religion is inconsistent with the Supreme Court's because his presupposes a belief in God. We understand that the Chief Justice disagrees with the Supreme Court's definition of religion, but we are bound by it.

As for the other essential premise of Chief Justice Moore's argument--that the Ten Commandments monument depicts only the moral foundation of secular duties-- the Supreme Court has instructed us that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone v. Graham,* 449 U.S. 39, 41, 101 S.Ct. 192, 194, 66 L.Ed.2d 199 (1980) (footnote omitted). The *Stone* decision did not hold that all government uses of the Ten Commandments are impermissible; they may be used, for example, in a secular study of history, civilization, or comparative religion. *Id.* at 42, 101 S.Ct. at 194. Use of the Ten Commandments for a secular purpose, however, does not change their inherently religious nature, and a particular governmental use of them is permissible under the Establishment Clause only if it withstands scrutiny under the prevailing legal test. As we discuss next, the use to which Chief Justice Moore, acting as a government official, has put the Ten

Commandments in this case fails that test.

C.

[*14] For a practice to survive an Establishment Clause inquiry, it must pass the three-step test laid out in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The *Lemon* test requires that the challenged practice have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion. *Id.* at 612-13, 91 S.Ct. at 2111.

We follow the tradition in this area by beginning with the almost obligatory observation that the *Lemon* test is often maligned. *See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 398, 113 S.Ct. 2141, 2150, 124 L.Ed.2d 352 (1993) (Scalia, J., concurring) ("[N]o fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the [*Lemon* test's] heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so."); *Wallace v. Jaffree,* 472 U.S. at 110, 105 S.Ct. at 2517 (Rehnquist, J., dissenting) ("The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize."); Elenore Cotter Klingler, Case Comment, *Constitutional Law: Endorsing a New Test for Establishment Clause Cases,* 53 Fla. L. Rev. 995 (2001). But it is even more often applied.

What the Supreme Court said ten years ago remains true

today: "*Lemon,* however frightening it might be to some, has not been overruled." *Lamb's Chapel,* 508 U.S. at 395 n. 7, 113 S.Ct. at 2148 n. 7. We applied the *Lemon* test in another religious display case just days before this one was orally argued. *See King v. Richmond County,* 331 F.3d 1271 (11th Cir.2003). In doing so, we observed that "[e]ven though some Justices and commentators have strongly criticized *Lemon,* both the Supreme Court and this circuit continue to use *Lemon*'s three-pronged analysis." *Id.* at 1276, slip op. at 2545-46 (footnote omitted). Having noted that again today, we proceed with the test.

Applying *Lemon,* the district court concluded that Chief Justice Moore's purpose in displaying the monument was not secular. It based that conclusion on the Chief Justice's own words, on the monument itself, and on the physical context in which it appears. *Glassroth,* 229 F.Supp.2d at 1299-1300. The court found the case not as difficult as those in which the Ten Commandments display had "an arguably secular, historical purpose, for the evidence here does not even begin to support that conclusion, nor does the evidence support the conclusion that the Ten Commandments were displayed as sort of a secular moral code." *Id.* at 1301. Instead, "[t]he Chief Justice's words unequivocally belie such purposes." *Id.*

Citing Justice O'Connor's concurring opinion in *Wallace v. Jaffree,* 472 U.S. at 74, 105 S.Ct. at 2499 (O'Connor, J., concurring), Chief Justice Moore argues that the district court erred by psychoanalyzing him and, as he puts it, "dissecting [his] heart and mind." Brief of Appellant at 42. *Wallace v.*

Jaffree involved legislative purpose, not that of an individual governmental actor. 472 U.S. at 40, 105 S.Ct. at 2481. Besides, no psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the Chief Justice's purpose.

[*15] Chief Justice Moore testified candidly that his purpose in placing the monument in the Judicial Building was to acknowledge the law and sovereignty of the God of the Holy Scriptures, and that it was intended to acknowledge "God's overruling power over the affairs of men." 1st Supp. Rec. Vol. 2 at 100; 1st Supp. Rec. Vol. 3 at 34. In his unveiling speech, the Chief Justice described his purpose as being to remind all who enter the building that "we must invoke the favor and guidance of Almighty God." *Glassroth,* 229 F.Supp.2d at 1297, 1322 (App. C). And he said that the monument marked "the return to the knowledge of God in our land." *Id.* at 1323. He refused a request to give a famous speech equal position and prominence because, he said, placing "a speech of any man alongside the revealed law of God would tend to diminish the very purpose of the Ten Commandments monument." *Id.* at 1297.

Against the weight of all this evidence, Chief Justice Moore's insistence in his briefs and argument, and in part of his testimony, that the Ten Commandments as presented in his monument have a purely secular application is unconvincing. That argument is akin to the state's contention in *Stone* that the fine print about secular purpose on the Ten Commandments posters in that case gave them a constitutionally permissible

purpose. 449 U.S. at 41, 101 S.Ct. at 193. At the bottom of each poster was a statement that: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the common law of the United States." *Id.*, 101 S.Ct. at 193. The Supreme Court said, "[u]nder this Court's rulings, however, such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." *Id.*, 101 S.Ct. at 193-94. The same is true here.

Under our circuit law, the purpose inquiry is a factual one, *see ACLU v. Rabun County Chamber of Commerce,* 698 F.2d 1098, 1110-11 (11th Cir.1983), and on appeal we are obligated to accept the district court's findings of fact unless they are clearly erroneous, *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Clearly erroneous they are not. Moreover, even if we were free to review the determination *de novo,* having examined the record ourselves, we agree with the district court that it is "self-evident" that Chief Justice Moore's purpose in displaying the monument was non-secular. Given all of the evidence, including the Chief Justice's own words, we cannot see how a court could reach any other conclusion.

Our inquiry could end there, because "[w]hen evidence shows that endorsement or promotion of religion was a primary purpose for the challenged practice ... the practice violates the Establishment Clause." *King,* 331 F.3d at 1278, slip op. at 2548. But in the interest of completeness, we will also review the district court's additional holding that the monument had the

primary effect of advancing religion.

[*16] "The effect prong asks whether ... the practice under review in fact would convey a message of endorsement or disapproval to an informed, reasonable observer." *Id.* at 1279, slip op. at 2549. The district court concluded that a reasonable observer would view the monument's primary effect as an endorsement of religion. *Glassroth,* 229 F.Supp.2d at 1302-03. It based that conclusion on: the appearance of the monument itself; its location and setting in the rotunda; the selection and location of the quotations on its sides; and the inclusion on its face of the text of the Ten Commandments, which is an "undeniably ... sacred text," *Stone,* 449 U.S. at 41, 101 S.Ct. at 194, all of which contributed to "the ineffable but still overwhelming holy aura of the monument," *Glassroth,* 229 F.Supp.2d at 1303-04. The court also considered: the fact that the Chief Justice campaigned as the "Ten Commandments Judge"; his statements at the monument's unveiling; and the fact that the rotunda is not a public forum for speech. *Id.* The court concluded that a reasonable observer "would find nothing on the monument to de-emphasize its religious nature, and would feel as though the State of Alabama is advancing or endorsing, favoring or preferring, Christianity." *Id.* at 1304.

The parties agree that our review of the district court's effect ruling is plenary. Having reviewed the matter *de novo,* and aided by the district court's meticulous findings of fact, we reach the same conclusion the district court did, which is to say that we also agree with the concession that Chief Justice Moore made in his testimony when he said that the monument "reflects

the sovereignty of God over men." 1st Supp. Rec. Vol. 3 at 34. The monument fails two of *Lemon* 's three prongs. It violates the Establishment Clause.

D.

Chief Justice Moore contends that even if it cannot clear the *Lemon* test, the monument is saved by the Supreme Court's decision in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). In that case, the Supreme Court considered a challenge to the Nebraska Legislature's practice of employing a chaplain to lead it in prayer at the beginning of each session. *Id.* at 784-85, 103 S.Ct. at 3332-33. Applying the *Lemon* test to the practice, the court of appeals concluded that the practice of beginning legislative sessions with prayer violated all three requirements of the test. *Id.* at 786, 103 S.Ct. at 3333. The Supreme Court, without applying *Lemon,* reversed on the ground that the challenged practice was "deeply embedded in the history and tradition of this country." *Id.* at 795, 103 S.Ct. at 3333, 3338.

The Court recounted the history of the practice, finding that "[f]rom colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.* at 786, 103 S.Ct. at 3333. The Court further noted that Congress authorized the appointment of paid chaplains just days before a final agreement on the language of the Bill of Rights was reached. *Id.* at 787-88, 103 S.Ct. at 3333-34. "Clearly the men who wrote the First Amendment Religion

Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788, 103 S.Ct. at 3334 (footnote omitted). The Court concluded that "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id.* at 792, 103 S.Ct. at 3336.

[*17] Turning back to this case, there is no evidence of an "unambiguous and unbroken history" of displaying religious symbols in judicial buildings. Chief Justice Moore insists, though, that *Marsh* must be read much more broadly, that the issue turns on "whether the monument's acknowledgments of God as the source of law and liberty in America parallel similar acknowledgments of God at the time of America's founding." Brief of Appellant at 44. That there were some government acknowledgments of God at the time of this country's founding and indeed are some today, however, does not justify under the Establishment Clause a 5280-pound granite monument placed in the central place of honor in a state's judicial building. The Supreme Court has warned that a broad reading of *Marsh* "would gut the core of the Establishment Clause" and has stated that "*Marsh* plainly does not stand for the sweeping proposition ... that all accepted practices 200 years old and their equivalents are constitutional today." *Allegheny County,* 492 U.S. at 603-04, 109 S.Ct. at 3106.

Chief Justice Moore has pointed to no evidence that the

Ten Commandments in any form were publicly displayed in any state or federal courthouse, much less that the practice of displaying them was widespread at the time the Bill of Rights was proposed and adopted. However it may be applied in any other context and circumstances, we do not believe that *Marsh* saves the Ten Commandments monument in this case from the proscriptions of the Establishment Clause.

E.

The result we reach in this case is not inconsistent with our recent decision in *King*, 331 F.3d at ----, slip op. 2541. In that case, we applied the *Lemon* test and concluded that the Seal of the Richmond County Superior Court did not violate the Establishment Clause despite its inclusion of a depiction of the Ten Commandments. *Id.* at ----, slip op. at 2556. The Seal included an image of two tablets, the first with Roman numerals I through V and the second with numerals VI through X. *Id.* at ----, slip op. at 2543. The Seal had been in use for more than one hundred thirty years, and there was no evidence about why the pictograph of the Commandments was originally included. The county proffered a plausible secular purpose, which was that the Commandments allowed illiterate Georgians to recognize the Seal as a symbol of law, and in the absence of any showing that the proffered secular purpose was implausible, we concluded that the County had satisfied the purpose prong of the *Lemon* test. *Id.* at ---- - ----, slip op. at 2546-48.

On the effect prong, we noted in *King* that the constitutionality of a government's use of a predominantly

religious symbol depends on the context in which it appears, *id.* at ---- - ----, slip op. at 2548-52, and we concluded that given the context in which the pictograph of the Ten Commandments appeared on the Seal, a reasonable observer would not believe that the Seal was an endorsement of religion. *Id.* at ---- - ----, slip op. at 2552-56. Alongside the tablets on the Seal was a sword, which is a symbol of the legal system, and we reasoned that the depiction of the Ten Commandments on that Seal must be taken in context. "Like the secular decorations surrounding the creche in *Lynch* or the other lawgivers who accompany Moses and the Ten Commandments on the south wall frieze of the Supreme Court building, the Seal's sword and the words 'SUPERIOR COURT RICHMOND COUNTY, GA' contextualize the Ten Commandants pictograph." *Id.* at 1284, slip op. at 2554 (footnote omitted).

[*18] In *King,* we also gave weight to the small size of the tablets: "[T]he pictograph of the tablets and sword is at most only one inch in diameter and is not the focal point of any governmental display in an important public building." *Id.* at 1285, slip op. at 2555. Finally we noted that the tablets did not include the text of the Ten Commandments, and that a reasonable observer would therefore be less likely to focus on the religious aspects of the Commandments. *Id.* at ---- - ----, slip op. at 2555-56.

The distinctions between that case and this one are clear. In *King,* there was no evidence of a non-secular purpose; in this case, there is an abundance of evidence, including parts of the Chief Justice's own testimony, that his purpose in installing the

monument was not secular. In *King,* the image was in the context of another symbol of law; in this case the monument sits prominently and alone in the rotunda of the Judicial Building. In *King,* the image was approximately one-inch in size and not a focal point; in this case the monument is an unavoidable two-and-one-half ton centerpiece of the rotunda. Finally, there was no text of the Commandments on the Seal in *King;* in this case the monument contains text from the King James version of the Bible.[3]

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[3] "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244, 102 S.Ct. 1673, 1683, 72 L.Ed.2d 33 (1982). Several amici in this case have pointed out that Chief Justice Moore chose the excerpts of the Ten Commandments from the King James Version of the Bible, which is a Protestant version. Jewish, Catholic, Lutheran, and Eastern Orthodox faiths use different parts of their holy texts as the authoritative Ten Commandments. "In some cases the differences among them might seem trivial or semantic, but lurking behind the disparate accounts are deep theological disputes." Steven Lubet, *The Ten Commandments in Alabama,* 15 Const. Comment. 471, 474-76 & n. 18 (1998); *cf. Lemon,* 403 U.S. at 628-29, 91 S.Ct. at 2119 (noting the conflict between Catholics and Protestants over the use of the King James Version of the Bible in nineteenth century public schools). To give but one example, the Hebrew translation of the Sixth Commandment prohibits only murder, not all killings as the King James Version does (and in the Lutheran and Catholic versions it is the Fifth Commandment, not the Sixth). *See* Brief of Amicus Curiae The American Jewish Congress at 15 (citing Gerald Blidstein, *Capital Punishment: The Classic Jewish Discussion,* in 14 *Judaism* 159 (1965)); Brief of Amicus Curiae Ala. Clergy, *et al.* at 14; Brief of Amicus Curiae Am.-Arab Anti-Discrimination Comm. at 13 n. 4; *see also Harvey v. Cobb County,* 811 F.Supp. 669, 677 (N.D.Ga.1993) ("As Rabbi Lewis testified, this ['Thou shalt not kill'] version of the Sixth Commandment is a mistranslation of the original Hebrew, which prohibits murder, and frequently appears in Christian versions of the Ten Commandments."), *aff'd mem.,* 15 F.3d 1097 (11th Cir.1994). The point is that choosing which version of the Ten Commandments to display can have religious endorsement implications

Nor is our decision today inconsistent with those from any other circuits in recent years involving the Ten Commandments. The Third Circuit issued an opinion just days before this one holding that the inaction of county commissioners with respect to a plaque that had been on the outside wall of a historically significant courthouse for more than eighty years did not violate the Establishment Clause. *Freethought Soc'y v. Chester County*, --- F.3d ----, No. 02-1765, 2003 WL 21468470 (3d Cir. June 26, 2003). That case is readily distinguishable from this one because the plaque had been there more than eight decades and no government entity or official has done anything in modern times to highlight or celebrate its existence, or even to maintain it; the plaque is not located in a prominent place but instead is away from the main entrance of the courthouse near a permanently closed door where visitors have no reason to go; and the text of the plaque is not visible to passersby on the sidewalk, who can see only the title "The Commandments." *Id.* at ---- - ----, ---- - ----, ---- - ----, man. op. at 5-7, 11-12, 31-33; *id.* at ----, 39 (Bright, J., concurring).

As the Third Circuit noted in the *Freethought Society* case, "a new display of the Ten Commandments is much more likely to be perceived as an endorsement of religion" by the government than one in which there is a legitimate "preservationist perspective." *Id.* at ----, ----, 31, 32; *see also id.* at ----, 33 ("[I]t is highly significant that there is no evidence that the County has taken any action involving the plaque since

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under the Establishment Clause.

it was erected 80 years ago."); *id.* at ----, 39 (Bright, J., concurring) (noting the "crucial facts" that the location of the plaque was not changed when the old entrance near it was closed, leaving the plaque barely visible from the street and its text mostly obscured, and concluding that "[a] world of difference exists between the conduct of the Chester County officials approving the placement of the plaque at the then main entrance to the Chester County Courthouse eighty-three years ago and the decision of Chester County not to remove the plaque as of today").

[*19] This case on its facts is closer to those in which the Sixth and Seventh Circuits have held prominent displays of the Ten Commandments on government grounds to violate the Establishment Clause. *See Adland v. Russ,* 307 F.3d 471 (6th Cir.2002) (returning a large, granite Ten Commandments monument from storage to a prominent position on the capitol grounds would violate the Establishment Clause), *cert. denied,* --- U.S. ----, 123 S.Ct. 1909, 155 L.Ed.2d 826 (2003); *Ind. Civil Liberties Union v. O'Bannon,* 259 F.3d 766 (7th Cir.2001) (erecting a seven-foot tall, 11,500-pound limestone monument, one side of which contained the Ten Commandments, on statehouse grounds would violate the Establishment Clause) *cert. denied,* 534 U.S. 1162, 122 S.Ct. 1173, 152 L.Ed.2d 117 (2002); *Books v. City of Elkhart,* 235 F.3d 292 (7th Cir.2000) (displaying a Ten Commandments monument, identical to the one involved in *Adland,* on the lawn of the municipal building violated the Establishment Clause), *cert. denied,* 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001).

F.

The difference in results between the *King* and *Freethought Society* decisions on the one hand, and the *Adland, Books*, and *O'Bannon* decisions on the other hand, illustrates that factual specifics and context are nearly everything when it comes to applying the Establishment Clause to religious symbols and displays.[4] Our decision is necessarily limited to the case before us. It implies nothing about different cases involving other facts. We do not say, for example, that all recognitions of God by government are per se impermissible. Several Supreme Court Justices have said that some acknowledgments of religion such as the declaration of Thanksgiving as a government holiday, our national motto "In God We Trust," its presence on our money, and the practice of opening court sessions with "God save the United States and this honorable Court" are not endorsements of religion. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 322-23, 120 S.Ct. 2266, 2286, 147 L.Ed.2d 295 (2000) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, JJ.) (the Establishment Clause does not prohibit singing the National Anthem with its concluding verse "And this be our motto: 'In God is our trust' "); *Lynch,* 465 U.S. at 693, 104 S.Ct. at 1369-

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[4] Chief Justice Moore contends that under the district court's reasoning, the sculpture of "Themis," the Greek goddess of justice, which is part of the fountain in front of the courthouse where the trial in this case took place, would also be unconstitutional. Brief of Appellant at 15 n. 4. His contention ignores the clear factual and contextual distinctions between that sculpture and the Ten Commandments monument. There is no evidence that the sculpture has had the effect of furthering religion, or that its purpose was to do so.

70 (O'Connor, J., concurring) ("Those government acknowledgments of religion [declaration of Thanksgiving as a holiday, the national motto on money, and the opening of court sessions with reference to God] serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs."); *id.* at 717, 104 S.Ct. at 1382 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.) (such acknowledgments are immune from Establishment Clause challenges "because they have lost through rote repetition any significant religious content"). In its *Allegheny County* decision, the Supreme Court did not imply that such acknowledgments of God in the Pledge of Allegiance and the National motto violate the Establishment Clause, "because there is an obvious distinction between creche displays and references to God in the motto and the pledge." *Allegheny County*, 492 U.S. at 603, 109 S.Ct. at 3106. For the same reason, our decision in this case does not imply that, either.[5]

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[5] While we are on the subject of what the decision in this case does not mean, we reject Chief Justice Moore's argument that this decision means that the Establishment Clause requires "the purging of all 'religious' sources from any opinions that the Chief Justice might write such as the one in *Yates v. El Bethel Primitive Baptist Church*, [No. 1001913, (Ala. Oct. 11, 2002) (Moore, C.J., dissenting)]." Brief of Appellant at 28. It means no such thing.

VI.

[*20] Finally, we turn to a position of Chief Justice Moore's that aims beyond First Amendment law to target a core principle of the rule of law in this country. He contends that the district court's order and injunction in this case contravene the right and authority he claims under his oath of office to follow the state and federal constitutions "as he best understands them, not as understood by others." Brief of Appellant at 51. He asserts that "courts are bound by the Constitution, not by another court's interpretation of that instrument," and insists that he, as Chief Justice is "not a ministerial officer; nor is he answerable to a higher judicial authority in the performance of his duties as administrative head of the state judicial system."[6] Brief of Appellant at 53.

The Chief Justice's brief reminds us that he is "the highest officer of one of the three branches of government in the State of Alabama," and claims that because of his important

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[6] A critical distinction is worth mentioning here. While all state and federal courts are bound to follow decisions of the United States Supreme Court, state courts when acting judicially, which they do when deciding cases brought before them by litigants, are not bound to agree with or apply the decisions of federal district courts and courts of appeal. *See Arizonans for Official English v. Arizona,* 520 U.S. 43, 58 n. 11, 117 S.Ct. 1055, 1064 n. 11, 137 L.Ed.2d 170 (1997); *Powell v. Powell,* 80 F.3d 464, 467 (11th Cir.1996). That is different from what we have here. At issue here is not a judicial decision of the Alabama Supreme Court, eight-ninths of which had nothing to do with the challenged action. At issue here is the conduct of a party, who concedes he acted not judicially but as the administrative head of a state government department, and in that capacity his conduct is subject to as much scrutiny as that of any head of any government department.

position, "Chief Justice Moore possesses discretionary power to determine whether a court order commanding him to exercise of [sic] his duties as administrative head is consistent with his oath of office to support the federal and state constitution." Brief of Appellant at 54. Article VI, clause 3, of the United States Constitution states: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution...." Article XVI, section 279 of the Alabama Constitution requires state officials to take a similar oath or affirmation to support the federal and state constitutions. Chief Justice Moore's argument takes his obligation and turns it into a license. To say the least, there is nothing in law or logic to support his theory.

The clear implication of Chief Justice Moore's argument is that no government official who heads one of the three branches of any state or of the federal government, and takes an oath of office to defend the Constitution, as all of them do, is subject to the order of any court, at least not of any federal court below the Supreme Court. In the regime he champions, each high government official can decide whether the Constitution requires or permits a federal court order and can act accordingly. That, of course, is the same position taken by those southern governors who attempted to defy federal court orders during an earlier era. *See generally, e.g., Meredith v. Fair,* 328 F.2d 586, 589-90 (5th Cir.1962) (en banc) (enjoining Mississippi Governor Ross Barnett from interfering with the district court's order to admit a black student to the University

of Mississippi); *Williams v. Wallace,* 240 F.Supp. 100, 110 (M.D.Ala.1965) (Johnson, J.) (enjoining Alabama Governor George C. Wallace from interfering with and failing to provide police protection for plaintiffs' march from Selma to Montgomery); *cf. United States v. Barnett,* 376 U.S. 681, 84 S.Ct. 984, 12 L.Ed.2d 23 (1964) (holding that the Governor of Mississippi was not entitled to a jury trial on a charge of criminal contempt for willfully disobeying a temporary restraining order of a federal district court).

Any notion of high government officials being above the law did not save those governors from having to obey federal court orders, and it will not save this chief justice from having to comply with the court order in this case. *See* U.S. Const. Art. III, § 1; *id.* Art. VI, cl. 2. What a different federal district court judge wrote forty years ago, in connection with the threat of another high state official to defy a federal court order, remains true today:

> [*21] In the final analysis, the concept of law and order, the very essence of a republican form of government, embraces the notion that when the judicial process of a state or federal court, acting within the sphere of its competence, has been exhausted and has resulted in a final judgment, all persons affected thereby are obliged to obey it.

United States v. Wallace, 218 F.Supp. 290, 292 (N.D.Ala.1963) (enjoining Governor George C. Wallace from interfering with

the court-ordered desegregation of the University of Alabama); *accord, e.g., Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); *Sterling v. Constantin,* 287 U.S. 378, 397-98, 53 S.Ct. 190, 195, 77 L.Ed. 375 (1932) (stating that if a state Governor could nullify a federal court order "that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases").

The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. The chief justice of a state supreme court, of all people, should be expected to abide by that principle. We do expect that if he is unable to have the district court's order overturned through the usual appellate processes, when the time comes Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail.

VII.

AFFIRMED.

EDMONDSON, Chief Judge, concurs in the result.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

Nos. 02-16708, 02-16949

District Court Docket Nos.
01-01268-CV-T-N &
01-01269-CV-T-N

[Stamp:] FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Jul 1, 2003
THOMAS K. KAHN
CLERK

STEPHEN R. GLASSROTH,
BEVERLY J. HOWARD,
Plaintiffs-Appellees,

versus

ROY S. MOORE,
Chief Justice of the Alabama Supreme Court,
Defendant-Appellant.

MELINDA MADDOX,
Plaintiff-Appellee,

versus
ROY S. MOORE, in his official capacity
as Administrative Head of the Alabama
Judicial System,
Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

[Seal:] ISSUED AS MANDATE
JUL 30 2003
U.S. COURT OF APPEALS
ATLANTA, GA.

Entered: July 1, 2003
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI, Clauses 2 and 3

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This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Constitution, Preamble

We, the people of the State of Alabama, in order to establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama:

Alabama Constitution, Article XVI, § 279

Sec. 279. Required of members of legislature and executive and judicial officers; form; administration.

All members of the legislature, and all officers, executive and judicial, before they enter upon the execution of the duties of their respective offices, shall take the following oath or affirmation:

> "I, ..., solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God."

The oath may be administered by the presiding officer of either

house of the legislature, or by any officer authorized by law to administer an oath.

Alabama Constitution, Amendment No. 328

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Sec. 6.10. Administration.

The chief justice of the supreme court shall be the administrative head of the judicial system. He shall appoint an administrative director of courts and other needed personnel to assist him with his administrative tasks. The chief justice may assign appellate justices and judges to any appellate court for temporary service and trial judges, supernumerary justices and judges, and retired trial judges and retired appellate judges for temporary service in any court. Adequate and reasonable financing for the entire unified judicial system shall be provided. Adequate and reasonable appropriations shall be made by the legislature for the entire unified judicial system, exclusive of probate courts and municipal courts. The legislature shall receive recommendations for appropriations for the trial courts from the administrative director of courts and for the appellate courts from each such court.

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Sec. 6.19. Disqualification.

A judge shall be disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an

information charging him in the United States with a crime punishable as a felony under a state or federal law, or (2) a complaint against him filed by the judicial inquiry commission with the court of the judiciary.

Alabama Constitution, Amendment No. 581

Sec. 6.17. Judicial Inquiry Commission.

(a) A Judicial Inquiry Commission is created consisting of nine members. The Supreme Court shall appoint one appellate judge who shall not be a Justice on the Supreme Court; the Circuit Judges' Association shall appoint two judges of the circuit court; the Governor shall appoint three persons who are not lawyers, who shall be subject to Senate confirmation before serving; the Lieutenant Governor shall appoint one district judge who shall be subject to Senate confirmation; and the governing body of the Alabama State Bar shall appoint two members of the state bar to serve as members of the commission. Provided, however, that on January 1, 2005, the appointment authority granted to the Lieutenant Governor shall revert to the Governor and the Governor shall thereafter be entitled to appoint three persons who are not lawyers and one district judge, all subject to Senate confirmation. The commission shall select its own chair. The terms of the members of the commission shall be four years. A vacancy on the commission shall be filled for a full term in the manner the original appointment was made.

(b) The commission shall be convened permanently with authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state. The commission shall file a complaint with the Court of the Judiciary in the event that a majority of the members of the commission decide that a reasonable basis exists, (1) to charge a judge with violation of any Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to charge that the judge is physically or mentally unable to perform his or her duties. All proceedings of the commission shall be confidential except the filing of a complaint with the Court of the Judiciary. The commission shall prosecute the complaints.

(c) The Supreme Court shall adopt rules governing the procedures of the commission.

(d) The commission shall have subpoena power and authority to appoint and direct its staff. Members of the commission who are not judges shall receive per diem compensation and necessary expenses; members who are judges shall receive necessary expenses only. The Legislature shall appropriate funds for the operation of the commission.

Sec. 6.18. Court of the Judiciary.

(a) The Court of the Judiciary is created consisting of one judge of an appellate court, other than the Supreme Court, who shall be selected by the Supreme Court and shall serve as Chief Judge of the Court of the Judiciary; two judges of the

circuit court, who shall be selected by the Circuit Judges' Association; and one district judge who shall be selected by the District Judges' Association. Other members of the Court of the Judiciary shall consist of two members of the state bar, who shall be selected by the governing body of the Alabama State Bar; two persons who are not lawyers who shall be appointed by the Governor; and one person appointed by the Lieutenant Governor. Members appointed by the Governor and Lieutenant Governor shall be subject to Senate confirmation before serving. Provided, however, that on January 1, 2005, the appointment authority granted to the Lieutenant Governor shall revert to the Governor and the Governor shall thereafter be entitled to appoint three persons who are not lawyers, subject to Senate confirmation. The court shall be convened to hear complaints filed by the Judicial Inquiry Commission. The court shall have authority, after notice and public hearing (1) to remove from office, suspend without pay, or censure a judge, or apply such other sanction as may prescribed by law, for violation of a Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to suspend with or without pay, or to retire a judge who is physically or mentally unable to perform his or her duties.

(b) A judge aggrieved by a decision of the Court of the Judiciary may appeal to the Supreme Court. The Supreme Court shall review the record of the proceedings on the law and the facts.

(c) The Supreme Court shall adopt rules governing the procedures of the Court of the Judiciary.

(d) The Court of the Judiciary shall have power to issue subpoenas. The Legislature shall provide by law for the expenses of the court.

STATUTES AND RULES INVOLVED

Federal Rule of Appellate Procedure 41(a)

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

Federal Rule of Civil Procedure 65

Rule 65. Injunctions

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(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Alabama Code of 1975 § 12-2-6

§ 12-2-6. Performance of duties of Chief Justice in event of extended absence from court or disability thereof.

Whenever the Chief Justice of the Supreme Court of Alabama shall, because of illness or otherwise, be disabled from actively performing his duties as chief justice or those ex officio duties imposed upon him by law or shall be absent from the court for a period of 30 days or longer, then, in either event, the duties so imposed upon him shall be performed by the available associate justice of the Supreme Court in order of seniority based upon continuous length of service on the court, and such associate justice of the Supreme Court is hereby authorized and empowered to perform all of the same in lieu of the chief justice during the latter's disability or absence from the court for said period longer than 30 days.

Alabama Code of 1975 § 12-2-30 (a) and (b)(7)

§ 12-2-30. Powers and duties as to supervision and administration of courts generally.

(a) The Chief Justice shall see that the business of the several courts of the state is attended with proper dispatch and that cases, civil and criminal, are not permitted to become congested or delayed, and he shall take care that prisoners are not allowed to remain in the jails without a prompt trial.

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(b) In connection with these duties and other responsibilities, the Chief Justice is authorized and empowered:

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(7) To take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state.

Alabama Code of 1975 § 12-5-20

§ 12-5-20. Review, etc., of administrative decisions of Chief Justice or Administrative Director of Courts by Supreme Court justices.

The justices of the Supreme Court shall have the power and authority to review, countermand, overrule, modify or amend any administrative decision by either the Chief Justice or the Administrative Director of Courts. A majority of all the justices shall constitute a quorum for such purpose. The concurrence of a majority of all the justices shall be sufficient to determine the question of whether and how such decision shall be so reviewed, countermanded, overruled, modified or amended.